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No. 10-

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

G. BEN COHEN*
BIDISH SARMA

THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

ROBERT J. SMITH

CHARLES HAMILTON HOUSTON
INSTITUTE FOR RACE & JUSTICE
125 Mount Auburn Street
Cambridge, MA 02138

**Counsel of Record for Petitioner*

QUESTIONS PRESENTED

In *Montejo v. Louisiana*, 556 U.S. ___ (2009), this Court remanded the case to the Louisiana Supreme Court so that Jesse Montejo could "pursue an *Edwards* objection" and "press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary." 129 S.Ct. at 2091-92. The Louisiana Supreme Court reinstated Montejo's conviction and death sentence without making the factual determinations or reviewing the substance of the claims that this Court instructed it to address. Given the state court's handling of this issue and the pattern of police conduct that concerned this Court on first review, the following questions arise:

1. Whether Montejo's September 10th waiver was invalid because it was based on the misrepresentations by police that he had not been appointed a lawyer?

2. Whether Montejo's September 10th statement should have been suppressed under *Edwards v. Arizona*, 451 U.S. 477 (1981)?

3. Whether a law enforcement officer's conduct violates *Edwards v. Arizona*, 451 U.S. 477 (1981), where he explicitly expresses disappointment with a suspect after the suspect has made a clear invocation of the right to counsel?

PARTIES TO THE PROCEEDING

The petitioner is Jesse Jay Montejo, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesse Jay Montejo respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINION BELOW

The Louisiana Supreme Court's opinion on remand is reported at *State v. Montejo*, 2006-KA-1807 (La. 05/11/10); 40 So. 3d 952, and is reprinted in the Appendix at App. A, 1A-75A. The denial of rehearing is reported at ___ So. 3d ___ and is reprinted in the Appendix at App. B, 76A.

JURISDICTION

The Louisiana Supreme Court entered its opinion on May 11, 2010. Rehearing was denied on June 25, 2010. This Court has jurisdiction. 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. CONST. AMEND. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

STATEMENT OF THE CASE

A. *Legal Proceedings*

In *Montejo v. Louisiana*, the Court stated that because its decision to overrule *Michigan v. Jackson*, 475 U.S. 625 (1986), altered the legal landscape, "Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*," and "may also seek on remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, e.g., his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer." *Id.* at 2091-92. The Court emphasized, "These matters have heightened importance in light of our opinion today." *Id.* The Louisiana Supreme Court declined to consider the merits of either issue. *See infra* Section I.

The Court also remanded the case so the state court could resolve the tension between Montejo's testimony and Detective Hall's testimony regarding the events that transpired on the afternoon of September 10, 2002. Officer Hall's testimony suggests that he asked Montejo whether a lawyer had contacted him, and that Montejo indicated that no lawyer had contacted him yet. Montejo's testimony suggested he told Hall, "I don't . . . I don't . . . I don't really want to go with you . . . I got a lawyer

appointed to me. . . ." JA at 242.[1] Montejo testified that Hall responded: "No, no you don't. . . . [to which Montejo] said, Yeah, I think I got a lawyer appointed to me." "[Hall] said, No, you don't. He said, I checked, you don't have a lawyer appointed to you." *Id.* The Louisiana Supreme Court *still* has not made an explicit credibility determination to ease whatever tension exists. *See infra* Section I(1).

Nor did the Louisiana Supreme Court address Montejo's contention that the elimination of the *Jackson* rule required it to re-examine the *Edwards* issue stemming from the September 6, 2002 interrogation, where Montejo indisputably invoked his right to counsel.[2] That interaction should be analyzed anew for its bearing on Montejo's September 10th invocation and as an independent issue that warrants this Court's review in light of the pattern of unethical police conduct here.

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[1] All citations to the Joint Appendix (JA) refer to the Joint Appendix in *Montejo v. Louisiana*, (07-1529) reported at 556 U.S. ___ (2009).

[2] The Louisiana Supreme Court acknowledged that the police conduct during that interrogation merited "close scrutiny." *State v. Montejo*, 974 So. 2d 1238, 1255 (La. 2008) [hereinafter *Montejo I*].

B. ***Factual Predicate***

At 10:02 p.m. on September 6, 2002, a video camera in an interrogation room at the St. Tammany Parish Sherriff's Office begins to roll. Jesse Montejo is "visibly upset," sobbing and sitting with his head in his hands, saying "What am I doing? What am I doing? What am I doing?"[3] *See, e.g.*, *Montejo I*, 974 So. 2d at 1247 n.35; State's Ex. 17-A (DVD version of the 2nd interview of Montejo). Ten minutes earlier, detectives had abruptly stopped the video recording after Montejo said:

> I would like to answer no more questions unless I'm in front of a lawyer.

Id.

Montejo's interaction with the police began earlier that day when Gretna, Louisiana police officers took him into custody. Lewis Ferrari, the proprietor of a local dry cleaning operation in Slidell, had been shot to death following an apparent

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[3] The Louisiana Supreme Court noted that Montejo appeared to be "visibly upset" once the videotape of the interrogation began to play again following the ten-minute gap that occurred immediately after Montejo invoked his right to counsel. *Montejo I*, 974 So. 2d at 1247.

robbery in his home the previous day. The victim's family suspected Jerry Moore, a local mechanic specializing in repair of dry cleaning equipment, who had a contentious relationship with Mr. Ferrari and who would have known that he was likely to be carrying a significant amount of cash with him on the evening of September 5th. *Montejo I*, 974 So. 2d at 1241. Police officers picked up Montejo for questioning because he was Moore's acquaintance who had provided transportation to Moore after his driver's license was revoked. *Id.*

Detectives transported Montejo to the St. Tammany Sheriff's Office. The detectives placed him into a small room and interrogated him over the next seven hours. No recording of the first two hours of interrogation exists. The video recording begins with heated questioning from the detectives who feed Montejo multiple storylines and try to get him to state that Jerry Moore killed Ferrari.[4] For example, the detectives told Montejo:

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[4] The Louisiana Supreme Court acknowledges "the detectives falsely claim[ed] that forensic analysis can determine when [Montejo] was in the home [and that] both detectives conceded at trial that they misled Montejo about forensic science." *Montejo I*, 974 So. 2d at 1245 n.26; *see also id.* at 1246 n.28 ("the detectives again mislead Montejo as to the capabilities of forensic science"); *id.* at 1246 n.29 ("the detectives again

> "It could still be a totally innocent deal for you if you went in there [but Moore shot Ferrari]."
>
> "If you were in the room when the gun was fired, it's not a hurdle we couldn't get past."

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exaggerate the capabilities of forensic science"); *id.* at 1246 n.30 ("Detective Major testified at trial that they did not have the DNA evidence at this time but claimed they did to encourage him to confess."). The Louisiana Supreme Court cites a law review article for the proposition that the technique of misleading suspects with false information is a highly effective device for obtaining self-incriminating information. *Id.* at 1245 n.26. The court did not mention that the article it cites, Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 813 (2006), argues:

> [I]n light of the growing body of empirical evidence demonstrating that law enforcement trickery plays a significant role in false confessions . . . courts should circumscribe interrogation techniques which employ lies to induce a suspect to confess, and legislatures should regulate or proscribe those deceptive interrogation techniques – such as false evidence ploys – which have proven most likely to elicit false confessions.

33 FORDHAM URB. L.J. at 796.

> "You could still be in the room and not be at fault."
>
> "An innocent person, it would only be natural to hide when he [Lou] came home."
>
> "You saw Jerry shoot the guy."

State's Ex. 14-B (DVD version of the 1st interview of Montejo).

Montejo stated that he accompanied an unidentified black male to Ferrari's house where that unidentified man shot the victim. App. A at 66A. This account is essentially consistent with: Montejo's final statement to detectives on September 6, 2002; Montejo's trial testimony; and the testimony of Mary Melancon, who testified at trial that Montejo explained the same order of events to her. *See Montejo I*, 974 So. 2d at 1248.

Detectives quickly rejected Montejo's explanation and urged him to implicate Jerry Moore instead. The videotape shows Montejo attempting to calibrate his version of events to deliver what the detectives wanted to hear. First, Montejo stated that "his only involvement was in driving Moore to the victim's home and leaving him there without knowing that Moore was going to rob and kill the

victim." *Id.* at 1245. The detectives were not satisfied. Next, Montejo said the victim was not home when he and Moore arrived. "After about 10 minutes, Moore started ransacking the residence, so Montejo left. He became disoriented and was briefly lost in the neighborhood. After he regained his bearings, he saw Moore drive away in the victim's car." *Id.* at 1246. The detectives rejected this story, too. The detectives "suggested that Moore would blame Montejo and confronted him with the possibility that the forensic evidence would prove that the victim scratched his neck or that he was present when the murder weapon was fired." *Id.* Again, Montejo calibrated his version to the storylines the detectives provided: Montejo stated that he "did not leave when Moore (who was wearing gloves) ransacked the home. Instead, he and Moore hid when the victim arrived." *Id.* Moore hit the victim in the back of the head with the gun; Montejo ran. "The victim turned and flailed wildly, scratching Montejo, and Moore shot the victim, who remained standing. As Montejo fled, he heard a second shot. Montejo became briefly lost in the neighborhood and saw Moore drive away in the victim's car." *Id.*

Having obtained a version of events that matched their desire to have Montejo implicate Jerry Moore, the detectives shifted gears. The detectives now tried to get Montejo to say that he shot Ferrari himself:

> "Hey, this was an accident, dude."
>
> "Jerry's got no DNA, but you do— this is your last chance to say this was an accident."
>
> "If you didn't mean to kill that man you better tell us now 'cause we're about to leave."
>
> "If you accidentally shot that man, now's the time to say it."

State's Ex. 14-B. Montejo adamantly denied shooting Ferrari. Undeterred, and using a tone the Louisiana Supreme Court labeled "hectoring,"[5] the detectives amped up their intensity level several notches:

> Q: (Shouting): Are you sorry for shooting that man?
>
> A: I didn't shoot him.
>
> Q: Yes you did.
>
> A: I. Did. Not. Shoot. That. Man.

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[5] *Montejo I*, 974 So. 2d at 1255.

Id. After enduring more than five hours of intensive and deceitful questioning, Montejo (this time on videotape) invoked his right to counsel:

> I did not kill that man, I did not break in, I did not steal anything. I would like to answer no more questions unless I'm in front of a lawyer.

Id.

The detectives switched tactics in an effort to convince Montejo to retract his request for counsel: "You are under arrest for first degree murder." *Id.* The detectives then told Montejo in no uncertain terms that it was not in his interest to invoke the right to counsel:

> Detective Major: Dude, you don't want to talk to us no more, ***you*** want a lawyer, right? ***I trusted you and you let me down.***
>
> Montejo: No, come here, come here.
>
> Detective Major: No, no, I can't.
>
> Montejo: No, come here . . .

> Detective Major: No, you've asked for an attorney, and you are getting your charge. And the shame of it is . . ."

Montejo I, 974 So. 2d at 1247 (emphasis added). Montejo then relented and stated that he did not want a lawyer. *Id.*

The Louisiana Supreme Court noted that "[t]he video recorder was turned off at this point and did not begin again until approximately 10 minutes later." *Id.* Thus, there is no recording of the exchange between the detectives and Montejo that prompted him to revoke his request for counsel. When recording resumed, at 10:02 p.m., it began with Detective Morse's question to a weeping and agitated – "What am I doing? What am I doing? What am I doing?" – Montejo regarding his purported decision to change his mind and waive the assistance of counsel. State's Ex. 17-A; *see also Montejo I*, 974 So. 2d at 1247 n.35.[6] The detectives told Montejo that he needed to affirmatively respond that he had voluntarily agreed to resume questioning.

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[6] Detective Morse testified that he resumed interrogation because Montejo "adamantly requested that we speak to him again." R. 1037. This testimony appears to be at odds with the videotape displaying Montejo sobbing and with his head in his hands from the commencement of the video recording.

Montejo relayed a story where he claimed that he was alone in the victim's house, believing that the victim would not be home or coming home any time soon, and that as he rummaged through the victim's bedroom, he found a gun and ammunition. Montejo said that he was startled when the victim arrived home and that the shooting that followed was accidental. State's Ex. 17-A; *see also Montejo I*, 974 So. 2d at 1247.

The videotape shows Montejo becoming more distraught as the detectives continued to interrogate him. Finally, Montejo told the detectives that he could not "take the rap" for something he did not do. State's Ex. 17-A. Montejo told the detectives that he wanted to tell them the truth, but that the truth was not something he thought they wanted to hear. Montejo reiterated his original explanation: He was at Ferrari's house with an unidentified black male who in fact shot Lewis Ferrari. *Id.* Visibly unhappy with this turn of events, the detectives ended the interrogation and formally processed Montejo for first-degree murder.

Montejo arrived at a holding cell around 3:30 a.m. Though Montejo had been picked up by the police more than twelve hours earlier, had been subjected to misleading and intensive questioning, and had ultimately told the detectives the same explanation that he originally provided [the only

version that was made largely without any storylines suggested by the police], the detectives showed up to interrogate him again in the middle of the night. R. 2350. The detectives (again) did not videotape the first portion of this interrogation. In response to this new interrogation, Montejo gave another version of events implicating himself in the murder.

On the morning of September 10, 2002 – four days after Montejo was detained and first interrogated – officers brought Montejo before a judge for a mandatory initial hearing, which Louisiana law dictates must take place within 72 hours of a defendant's arrest. Because the rule is automatic, law enforcement officials have notice that within 72 hours of arrest, indigent defendants will be appointed counsel. A representative of the Sheriff's office attended the hearing.[7] The minute record (which is the only record of the hearing) attests that the court denied Montejo bail and appointed him counsel through the Office of the Indigent Defender. *Montejo I*, 974 So. 2d at 1258-59; *see also* JA at 78.

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[7] Detective Morse acknowledged that a representative of the Sheriff's Office was present at the hearing. JA at 134, 170. It is unclear from the subsequent colloquy who represented the office, but it was established that Rodney Strain was the Sheriff of St. Tammany Parish on the hearing date. *Id.* The minute record also notes that Sheriff Strain was present. *Id.* at 134.

Upon completion of the "72-hour hearing," Montejo was brought back to the Sheriff's office. Shortly after he returned, Detectives Hall and Galloway visited Montejo to commence another interrogation. *Montejo I*, 974 So. 2d at 1250 n.49. The detectives told Montejo that they wanted him to accompany them on a car ride so that he could show them where he discarded the gun that was used to shoot Mr. Ferrari. In response, Montejo told them that he was represented by counsel:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me.

JA at 242.

The detectives again pushed Montejo to allow an uncounseled interrogation. They told Montejo that he did not have a lawyer. Montejo testified:

> [Hall] said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No,

> you don't, He said, I checked, you don't have a lawyer appointed to you.

Id.

The detectives gave Montejo *Miranda* warnings. The detectives then took Montejo from the Sheriff's office in their car. Montejo's appointed counsel arrived at the Sheriff's Office to confer with his client shortly after the detectives took Montejo away. JA at 78; *id.* at 180 ("He [Montejo's lawyer] was pretty upset in that I had been out with Mr. Montejo that afternoon."). Thus, Montejo's lawyer did not have the opportunity to consult with his client before the September 10th interrogation.

With his lawyer unavailable to him, the police elicited from Montejo a statement describing his destruction of evidence, and admitting that the statements were freely and voluntary given. They also suggested during the car ride that Montejo write a letter to the victim's wife expressing remorse for his involvement in the murder. *Montejo I*, 974 So. 2d at 1250 n.49; State's Ex. 76 (letter). Montejo testified at trial that the detectives dictated much of the letter's content. *Montejo I*, 974 So. 2d at 1250 n.49; JA at 247. For example, the letter contained the term "simple burglary" — a classification of burglary specific to Louisiana that was unlikely to be a term known to a layperson. JA at 247; *see also Montejo I*,

974 So. 2d at 1250 n.48. Montejo testified that he did not know what simple burglary was at the time that he wrote the letter. JA at 247. The Louisiana Supreme Court noted Montejo's testimony that Detective Galloway "suggested" most of the letter, and noted further that Detective Galloway did not testify at trial. *Montejo I*, 974 So. 2d at 1250 n.49.

After Montejo finished the letter to the victim's spouse, the detectives ended the car ride. *Id.* at 1249 n.44. When they returned to the Sheriff's office, they found Montejo's lawyer waiting for them. JA at 179-81. Detective Hall testified: the "pagers were going off and the cell phones were going off and we were being directed back to the investigation's bureau to meet with a public defender." *Id.* at 180. Detective Hall explained that when he met with the public defender, the attorney was "pretty upset that I had been out with Montejo that afternoon, and he started getting on me pretty intently about having been retained as [Montejo's] counsel." *Id.* at 180-81. No testimony established why the detectives would not expect Montejo to be represented more than 72 hours after his arrest. Nor does the record establish why the dispatcher could not reach the detectives as they drove around in their own police vehicle with pagers and cell phones (and also a closed-circuit radio in the vehicle) while Montejo's counsel remained at the Sherriff's office trying to contact the detectives to bring his client back to the station.

C. *Proceedings Below*

The proceedings that occurred prior to the decision in *Montejo v. Louisiana* are detailed in Montejo's opening brief in that case. In *Montejo*, this Court remanded the case to the Louisiana Supreme Court. Montejo urged the Louisiana Supreme Court to remand to the district court for fact finding. He also contended that the State's intentional misrepresentations prevented him from meeting his attorney, rendering his statements inadmissible. Montejo also pressed his *Edwards* claim, both because the police ignored his clear request for counsel on September 10th, and because the detectives never complied with his unequivocal request for counsel on September 6th. He detailed why these errors are not harmless beyond a reasonable doubt.

The Louisiana Supreme Court affirmed Montejo's conviction and death sentence. *State v. Montejo*, 2006-KA-1807 (La. 05/11/10); 40 So. 3d 952 (hereinafter *Montejo II*). Despite this Court's consternation of Louisiana's "unsound," "unworkable" and "troublesome" interpretation of the then-applicable *Jackson* rule,[8] the Louisiana

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[8] This Court noted that the Louisiana Supreme Court's analysis of the *Jackson* rule was derived from a Fifth Circuit decision. *Montejo*, 129 S. Ct. at 2083.

Supreme Court referred to Montejo's *Jackson* claim as "dubious" even if *Jackson* remained good law. App. A at 48-49A. Though this Court stated that Montejo's reliance on *Jackson* instead of *Edwards* or *Burbine* was "understandabl[e]," the Louisiana Supreme Court explained that the "dubious basis" of Montejo's *Jackson* claim meant that he should have relied upon *Edwards* and *Burbine* as alternative grounds at the suppression hearing. *Id.* That court refused to provide substantive review, and refused rehearing. This Petition ensues.

REASONS FOR GRANTING THE WRIT

The State of Louisiana secured a conviction and death sentence against Jesse Montejo through a series of interrogations over a four-day period despite Montejo's repeated requests for counsel.

The Louisiana Supreme Court's opinion on remand seems calibrated to evade this Court's review. This Court was very clear. The state court should answer the state law question: whether testimony at trial could be considered when determining whether a statement can be introduced. The Louisiana Supreme Court answered that question, "yes."[9] This Court also held that Montejo

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[9] The Louisiana Supreme Court agreed it "has stated that it will look to the totality of the evidence presented at the motion

could press any claim related to the September 10th statement. But, the Louisiana Supreme Court held that Montejo *could not* raise the claims because they had not been raised before.[10]

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to suppress hearing and the trial." App. A at 45A (citing *State v. Burkhalter*, 428 So. 2d 449, 455 (La. 1983) and *State v. West*, 408 So. 2d 1302, 1308 (La. 1982) ("Although the state put on no evidence at the hearing on the motion to suppress, we look to the totality of the evidence produced both at that hearing and at trial when we assess whether the state has carried its burden.")).

[10] That the Louisiana Supreme Court ignored the remand order should suffice. Additionally, the district court specifically cited *Burbine* and *Edwards* in relation to its decision to admit the September 10th interrogation, and the Louisiana Supreme Court decided the *Burbine* claim on the merits. *See, e.g, Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."). Moreover, the procedural rule that the Louisiana Supreme Court applied to default Montejo is newly crafted and uniquely applied to him. Not a single case that the Louisiana Supreme Court cites in support of its purported procedural bar stands for the proposition that Louisiana courts read "new grounds" to include alternative arguments under the same constitutional ground asserted at the suppression hearing. *See, e.g., State v. Brown*, 434 So. 2d 399, 402 (La. 1983) (accused cannot rely on state procedural bar argument on appeal when he relied at trial solely on the grounds that "the incriminating statements were elicited from the defendant in derogation of his Sixth Amendment right to

The state court's decision to leave intact its original treatment of the *Burbine* issue is particularly troublesome. The Louisiana Supreme Court's decision relied upon a clear misstatement of federal law: "[T]he United States Supreme Court permitted a *Miranda* waiver to stand under the *Sixth Amendment* where a suspect was not told that his lawyer was trying to reach him during questioning and the lawyer was told by police that the defendant would not be questioned without the lawyer's presence." *Montejo I*, 974 So. 2d at 1262 n.69 (emphasis added). *Burbine* is a *Fifth Amendment* decision wherein the Court emphasized that deceitful police conduct of the type evidenced there would not be tolerated in the Sixth Amendment context. Supreme Court Rule 10 (c) review is appropriate because the state court "decided an important federal question in a way that conflicts with relevant decisions of this Court."

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counsel."). Unsurprisingly, the Louisiana Supreme Court itself frequently uses the term "grounds" to apply to the specific federal constitutional amendment upon which the claim rests rather than an alternative argument that springs from the same constitutional source. *See, e.g.*, *State v. Smith*, 785 So. 2d 815, 818 (La. 2001) ("The failure . . . to secure a *Miranda* waiver . . . *did not require suppression . . . on Fifth Amendment grounds*.") (emphasis added).

Finally, the state court ruled that any potential error was harmless merely because DNA evidence connected Montejo to the murder scene. The harmless-error analysis did not even consider whether the introduction of the tainted evidence prejudiced Montejo's defense against the death penalty, or whether it prejudiced his defense of second rather than first-degree murder (a claim entirely consistent with the Montejo's defense in the case).

Especially now that *Jackson* no longer stands, thorough review of apparent police misconduct is necessary to guarantee that a post-attachment decision to forego counsel is the result of a voluntary choice by the accused. The Louisiana Supreme Court twice failed to provide meaningful review. This Court should grant the Petition and reverse.

I. THE SEPTEMBER 10th STATEMENTS SHOULD HAVE BEEN SUPPRESSED

1. The Detectives Violated the Sixth Amendment by Falsely Informing Montejo that He Did Not Have a Lawyer Appointed to Represent Him

Montejo testified at trial that he explained to Detective Hall on September 10th that he did not want to go for a ride and that he already had been appointed counsel: "I said, well, and I don't, I don't, I don't really want to go with you. He said, Do you

have a lawyer? I said, yeah, I got a lawyer appointed to me." JA at 242. Detective Hall said, "no, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't, He said, I checked, you don't have a lawyer appointed to you."[11] *Id.*

The Louisiana Supreme Court assumed Montejo's testimony to be credible, but cited *Burbine* – incorrectly identifying it as a decision under the Sixth rather than Fifth Amendment – for the proposition that deliberate law enforcement deceitfulness does not vitiate the integrity of a right to counsel waiver. *See Montejo I*, 974 So. 2d at 1261-62 n 69. This is not so.

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[11] Detective Hall's testimony was in some respects consistent with Montejo's. For example, Detective Hall stated that Montejo "told him he had not been contacted by an attorney," when the officers began to interrogate him — which apparently is true, as Montejo's court-appointed lawyer was trying unsuccessfully to reach Montejo while the police were interrogating him. According to the Louisiana Supreme Court, Detective Hall also "testified that, at some point during this excursion," — i.e., after the police had improperly obtained the "waiver" — "he asked Montejo whether he had a lawyer or anyone in his family had contacted him about retaining one for him, and Montejo responded negatively." *Montejo I*, 974 So. 2d at 1249 n.46.

In *Moran v. Burbine*, 475 U.S. 412 (1986), this Court addressed a case where the lawyer for a pre-indictment suspect (whom the suspect's sister had retained without suspect's knowledge) phoned the police station to inform officers that she represented the suspect. The officers assured her that he would not be interrogated before she arrived the next day. However, the suspect confessed later that same evening. The police never informed him that his sister had retained a lawyer for him. But, he never made any semblance of a request to have counsel present. Stating that the police are not required to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights," the Court held "only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions." 475 U.S. at 422, 428.

This Court has suggested just the opposite in the Sixth Amendment context. In *Burbine*, the Court explained that the "difficulty for respondent is that the interrogation sessions that yielded the inculpatory statements took place *before* the initiation of 'adversary judicial proceedings.'" *Id.* at 428 (internal citation omitted) (emphasis in original). Indeed, the *Burbine* Court "readily agree[d] that once the right has attached, it follows that the police may not interfere with the efforts of a defendant's

attorney to act as a medium between the suspect and the State during the interrogation." *Id.* (internal citation omitted). The Court has explicitly recognized that the scope and nature of a defendant's right to counsel changes when his Sixth Amendment right attaches. Where a defendant's Sixth Amendment right to counsel is at stake, the police may not prevent an attorney from trying to meet his client. *See Maine v. Moulton*, 474 U.S. 159, 176 (1985); *Brewer v. Williams*, 430 U.S. 387, 401 n.8 (1977); *Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988) ("For example, we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid." (citing *Burbine*, 475 U.S. at 424, 428)).

Not only did the encounter at issue occur after Montejo's Sixth Amendment right to counsel attached, but the facts here are far more offensive to the right than those presented in *Burbine*. The detectives did not simply fail to "help [the defendant] calibrate his self-interest;" Detective Hall affirmatively told Montejo[12] that he had not been

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[12] Detective Hall indisputably provided Montejo with incorrect information. The only question left unresolved by the Louisiana Supreme Court was whether Detective Hall knew he was providing false information or whether, as Hall claimed, he was

appointed counsel. *Cf. Colorado v. Spring*, 479 U.S. at 576 n.8 ("the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege."); *Missouri v. Seibert*, 542 U.S. 600, 616 (2004) (plurality opinion) (ruling statements inadmissible where it found: "At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings."); *id.* at 620-21 (Kennedy, J., concurring) (The unconstitutional "tactic relies on an *intentional misrepresentation* of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use." (emphasis added)).

Moreover, unlike Mr. Burbine, Montejo stated that he did not want to go with the detectives and then affirmatively indicated that he had been appointed counsel. This is the second indication that Montejo made to the same detectives that he wished to speak with a lawyer. Montejo's testimony is particularly disturbing because the detective claimed that he had checked and that Montejo had not been appointed counsel. In *Moulton*, the Court emphasized that the Sixth Amendment provides the

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unaware that counsel had been appointed to Montejo in this capital murder case.

accused with "the right to rely on counsel as a 'medium' between him and the State." 474 U.S. at 176. The Court elaborated on the unique "affirmative obligation" that the Sixth Amendment imposes on law enforcement "not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Id.* The *Moulton* Court underscored that a determination of whether a law enforcement agency's actions contravene the right to counsel must be made in light of this obligation.

Detective Hall testified that he did not know that Montejo had been appointed an attorney. JA at 77. His testimony is at least puzzling. *See* Transcript of Oral Argument at 30-31, *Montejo*, No. 07-1529 (U.S. argued Jan. 13, 2009) (Ginsburg, J.), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1529.pdf ("That's very puzzling. This is an experienced police officer. The 72-hour hearing is required in every case where defendant is in State custody. So how could an experienced police officer not know? . . . The very same day that he [Montejo] got to the 72-hour hearing a day late, how could he [Hall] not have known?"); *id.* at 31 (Kennedy, J.) ("of course, they [the police] know – it's a death case – that counsel is going to be appoint – or it's a murder case – that counsel is going to be appointed. Everybody knows that except this defendant."); *id.* at 34-35 (Stevens,

J.) ("But it happens in 99 percent of the cases, I think, in a capital case. And surely, the police should be presumed to know what the normal procedure is.").

The detectives that approached Montejo *after* he attended his 72-hour hearing were experienced law enforcement officers.[13] They also were the same detectives who were present at the interrogation on September 6th and 7th. These officers knew both that every defendant in Louisiana is taken to a 72-hour hearing to have counsel appointed *and* that Montejo had been in custody for more than 72 hours.[14]

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[13] Article 230.1, § A of the Louisiana Code of Criminal Procedure requires that "a sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel. . . ." La. C. Cr. P. Art. 230.1.

[14] Even if those particular detectives did not know that Montejo had been appointed counsel (an implausible scenario), the minute record of the 72-hour hearing indicates that Sheriff Strain was present. JA at 78. Detective Morse also testified at the suppression hearing that a representative of the Sherriff's office stood present at the hearing. This Court's jurisprudence imputes knowledge of a defendant's request for counsel to the entire police force. *See Arizona v. Roberson*, 486 U.S. 675, 680 n.3 (1988) ("knowledge of request for counsel 'is imputed to all law enforcement officers who subsequently deal with the suspect'") (internal citation omitted).

Detective Hall's carefully calibrated testimony suggests that the police conduct was guided by deception rather than a desire for a voluntary rights waiver.[15]

Moreover, in *Burbine*, the retained lawyer simply called the police station. She did not show up and demand to speak with her client. In contrast, the record here suggests Montejo's counsel walked through the front door while detectives scrambled out the back door with Montejo in tow. The detectives drove Montejo in their official police vehicle. In addition to any two-way radio native to the vehicle, the detectives had cell phones and pagers "going off." No evidence explained why the prison staff could not reach the detectives in their official vehicle. However, Detective Hall testified

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[15] Police misconduct throughout the record colors the detectives' credibility. The detectives repeatedly deceived Montejo during the September 6th interrogation. *See, e.g.*, *supra* note 4. Other mistakes also give pause. On the videotape initially provided to defense counsel, Montejo's request for counsel was inaudible due to 'electronics' malfunction. *See* JA at 88 ("Defense counsel: The tape that we saw does not show asking for a lawyer right. . . . It ended before that."). The waiver forms that make up State's Exhibits 67 and 68 both indicate that Detective Hall interviewed Montejo prior to the appointment of counsel on September 9th; however in both instances the interviews actually occurred after the appointment of counsel on September 10th. *See* JA at 175.

that when they finally arrived back at the station, "pagers were going off and the cell phones were going off and we were being directed back to the investigation's bureau to meet with a public defender." JA at 180. Detective Hall testified that Montejo's lawyer was "pretty upset that I had been out with Montejo that afternoon, and he started getting on me pretty intently about having been retained as [Montejo's] counsel." JA at 180-181.

The detectives affirmatively misrepresented to Montejo that he did not have a lawyer, prevented his counsel from locating him; and failed to fulfill their duty under *Moulton*. On the afternoon of September 10th, Montejo had asked for a lawyer more than three days earlier and still had not met with one. Montejo also thought he had already been appointed an attorney, but, according to the police, that appointment had not really happened. Faced with rife misinformation and deceit, Montejo confronted two grim prospects: first, the police would continue to interrogate him indefinitely (or, presumably until he gave them the answers they wanted to hear); and, second, no lawyer would come to represent him. The police conduct here runs afoul of the Sixth Amendment.

This Court provided the Louisiana Supreme Court with a second opportunity to make an explicit credibility determination regarding the testimony

that forms the core of the Sixth Amendment issues here. That court chose to leave the record unaltered. This Court should decide the case on this record. The prosecution must demonstrate the voluntariness of a Sixth Amendment waiver. It cannot do so here.

2. *The Detectives' Refusal to Comply with Mr. Montejo's Unambiguous Request for Counsel Violates* Edwards.

The record contains two versions of what happened when detectives approached Montejo on September 10, 2002. One version – Montejo's – establishes an *Edwards* violation. The other version – Detective Hall's – does nothing to disprove it. *See supra* Section I(1) (detailing Hall's testimony). Because the state court declined to make a credibility determination, Montejo's testimony governs, and it establishes that the detectives violated *Edwards*.

The question under *Edwards* is whether the suspect "has invoked his right to have counsel present;" if he has, the "interrogation must stop." *Montejo*, 129 S.Ct. at 2090 (citing *Edwards*, 451 U.S. at 484). The record clearly establishes that the interrogation did not stop; thus, the question here simply is whether Montejo invoked his right to counsel when told the detectives:

> I don't, I don't, I don't really want to go with you, . . . I got a lawyer appointed to me.

JA at 242. The meaning of Montejo's statement is clear: I do not want to go with you because I have a lawyer. *Cf. Minnick v. Mississippi*, 498 U.S. 146 (1990) (*Edwards* violation occurred where police continued interrogation after the suspect stated (in part): "Come back Monday when I have a lawyer").[16]

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[16] Though the Louisiana Supreme Court procedurally barred this claim, it addressed the merits in summary fashion, stating that Montejo's request for counsel is "more properly characterized as a statement that the defendant might want counsel, or an 'ambiguous or equivocal' request for counsel, or an indecisive request for counsel, each of which the *Davis* Court stated would be insufficient to trigger *Edwards* protections against further questioning." App. A at 55A (citing *Davis v. United States*, 512 U.S. 452, 459 (1994). This everything-but-the-kitchen-sink justification for the fact that the police did not respect Montejo's invocation is incorrect. In *Davis*, the suspect stated, "[m]aybe I should talk to a lawyer." 512 U.S. 452, 455 (1994). The *Davis* Court noted that "the uncontradicted testimony of one of the interviewing agents" that the police,

> made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and

Here, the suspect did not elect to speak with the police. *See Texas v. Cobb,* 532 U.S. 162 (2001). Montejo had been in police custody for more than 90 hours at the time the detectives arrived at his holding cell on the 10th. He had been interrogated extensively, and as the Louisiana Supreme Court noted, harshly and deceitfully, including for more than seven hours straight on the 6th and 7th. The video shows Montejo's distress as the police display persistent displeasure. The video shows Montejo's despair as he attempts to tell detectives the truth, which is that he was not the shooter, and they

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> he said, ['] No, I'm not asking for a lawyer,' and then he continued on, and said, 'No, I don't want a lawyer.'

Id. In stark contrast, Montejo stated that he did not want to go *and* that he had been appointed a lawyer. Unlike *Davis*, the detectives here did not "ma[k]e it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him," but instead responded by falsely informing Montejo that he had not been appointed counsel. *See Spring*, 479 U.S. at 576 n.8 (noting "the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege"); *Burbine*, 475 U.S. at 424 (police "conduct is [ ] relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.").

respond with disdain. The video shows Montejo unequivocally assert his desire to speak with a lawyer, but the detectives swiftly expressed disappointment with Montejo when he elected to take that path, and they immediately charged him with first-degree murder. A magistrate had appointed counsel earlier on the 10th. But, the detectives continued to come and go from his holding cell at least three times on that day alone. This is the context in which this Court must consider Montejo's invocation of the right to counsel.

In *Montejo v. Louisiana*, this Court provided assurance that "a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings." 129 S.Ct. at 2090. At that point, not only must the immediate contact end, but 'badgering' with later requests is also prohibited. However, none of the promises of *Edwards*'s sufficiency ring true here if this Court leaves Montejo's conviction and sentence intact. First, the record indicates that on September 10th, detectives provided Montejo with *Miranda* warnings *after* Montejo told them he did not want to go and that he already had an attorney. In this situation, there is no need to worry about protecting the defendant's ability to elect to speak with police; the concern must be to protect the defendant from badgering that renders the Fifth Amendment hollow.

September 10th was not the first time Montejo requested counsel. Once a defendant invokes his right to counsel, police officers cannot re-initiate questioning unless the defendant has counsel with him. *Minnick*, 498 U.S. at 153. Therefore, in considering the September 10th letter, this Court should also answer the antecedent question – addressed in Section II, of whether the September 6th waiver following Montejo's unequivocal request for counsel was valid.

3. The Error Is Not Harmless Beyond A Reasonable Doubt

This Court reviews state court harmless-error analysis *de novo*. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless, beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The State must carry that stringent burden, and cannot do so on this record.

As the Louisiana Supreme Court observed, at the time of trial, the defense made clear that Montejo would not have testified but for the trial court's rulings on the motion to suppress statement. App. A at 15A ("On the morning before trial, out of the presence of the jury, defense counsel remarked that his client's decision to testify was based, in part, on the denial of his motion to suppress."). Montejo

defended against the first-degree murder charge by stating at trial that he did not shoot Ferrari. That defense was consistent with Montejo's September 6th statements and is corroborated by Mary Melancon's trial testimony. The September 10th letter is the strongest evidence contradicting Montejo's trial testimony because it indicates that Montejo intentionally shot Ferrari during the course of a burglary. The only other evidence that Montejo shot Ferrari comes from Montejo's statement early in the morning on September 7th, after he had endured an enervating and ruthless 12-hour long interrogation. The September 10th letter is damning because it corroborates that version of events.

The error's harmfulness is particularly acute at the sentencing phase. The entire penalty phase was completed before lunch. The defense called only two witnesses. Montejo had testified at the guilt phase to confront the letter. His efforts to retract the apology letter – and thus support his defense that he did not shoot Ferrari – were characterized as retracting his remorse for his role in the shooting death of Mr. Ferrari.

The letter's powerful nature reveals why the prosecution relied so heavily upon it throughout the trial. The State's opening statement repeatedly and dismissively invoked what it referred to as Montejo's

"I'm so sorry" defense.[17] By the end of the opening, the prosecution was using the letter not just to incriminate Montejo, but also to mock him. R. 2262 ("It was a close contact wound. I am so sorry."). The prosecution next used the letter to impeach Mary Melancon, the only witness the defense called in the guilt phase. After being shown the letter, Melancon testified that she "didn't even know that [the letter] existed." JA at 253. The prosecution then showed the letter to the jury. R. 2819-20. Finally, during the rebuttal portion of closing argument – the last statement the jury heard before deliberating – the prosecution again returned to "I am so sorry" and invited the jury to credit Montejo's confession while at the same time calling him a liar.[18]

The Louisiana Supreme Court's determination that the error was harmless is akin to sticking the

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[17] *See* JA at 166 ("The defendant . . . write[s] a letter to this lady and tell[s] her I'm sorry, I am so sorry. . . . [I]t shouldn't have happened this way and he feels sorry."); R. 2258-59 (Wait, wait, wait, we got another version . . . the I am so sorry version."); R. 2259 ("So it will be up to you to evaluate the . . . I-am-so-sorry version. . . ."); R. 2261 ("We also then get the I'm-so sorry version").

[18] *See* JA at 291, 290 ("[Y]ou know [it] is not to be true" that "the finest of St. Tammany Parish police officers lied, deceived you, because they coerced an apology letter from the defendant."); R. 2834 ("A man died for that shit, you are touching my heart. . . . Another lie. I am so sorry.").

label-'kosher' on a pig and calling it a cow. Saying it doesn't make it so. The court's opinion does not even address the statement's impact on the penalty phase, or on the jury's determination that Montejo was guilty of first rather than second-degree murder. Nor does the Court address the possibility that multiple confessions could unfairly "reinforce[] and corroborate[] each other." *Arizona v. Fulminante*, 499 U.S. 279, 299 (1991). The error is not harmless.

II. THE POLICE OBTAINED THE SEPTEMBER 6th STATEMENTS BY VIOLATING *EDWARDS*.

The Fifth Amendment jurisprudence requires police officers to "scrupulously honor" the defendant's request for counsel by ceasing interrogation immediately after the suspect's request for a lawyer. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). In *Rhode Island v. Innis*, the Court underscored that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. 291, 301 (1980).

The Louisiana Supreme Court acknowledges that Montejo unequivocally requested counsel on September 6, 2002. *See Montejo I*, 974 So. 2d at 1254

("Defendant's unequivocal and unambiguous request for counsel was captured on video."). However, that court ruled that Montejo unilaterally retracted his request and re-initiated conversation about his case. The video recording tells a different story:

> Detective Major: Dude, you don't want to talk to us no more, you want a lawyer, right? *I trusted you and you let me down.*
>
> Montejo: No, come here, come here.
>
> Detective Major: No, no, I can't.
>
> Montejo: No, come here . . .
>
> Detective Major: No, you've asked for an attorney, and you are getting your charge. And the shame of it is . . . .

Id. at 1255 (emphasis added). Only at this point does Montejo relent and state that he does not want a lawyer. *Id.*

The Louisiana Supreme Court found Detective Major's comments warrant "close scrutiny" because he commented on Montejo's election to not communicate outside the presence of counsel. *Id.* That court also commented on Detective Major's "hectoring" tone when the detective stated: "No,

you've asked for an attorney, and you are getting your charge. And the shame of it is . . . ." *Id.* Detective Major's comments constitute the functional equivalent of interrogation. Any person – not to mention a person who has been arrested, placed into an interrogation room, and lied to and screamed at for more than five hours – would respond to sentiments such as "I trusted you and you let me down" and "the shame of it is" with a response.

The Louisiana Supreme Court was simply wrong to hold that a defendant's response to the police officer's assertion "you let us down," constituted an initiation. *Id.* at 1256. That the officer's statements precipitated Montejo's change of mind is a clear indication that the detective rather than Montejo initiated the communication. *See, e.g.*, *United States v. Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991).

Moreover, the fact that the video recording – which had been working properly for hours on end while the police sought to have Montejo incriminate himself – coincidentally stopped right when the detectives attempt to get Montejo to retract his right to counsel is at least unsettling. The testimony of lead detective Morse only heightens the discomfort. Morse testified:

We were walking out of the interview room. He said well, what is going to happen now? Basically, we said, well, you're going to be arrested. He said wait, I have some other stuff I want to talk to you about. I told him, I said, well, you have asked for an attorney. We cannot continue with this interview with you. He said please, I really got a lot more stuff. He said I don't want it to look bad for me. I want to talk to you some more. I said, Jesse, I can't talk to you anymore. This went on a couple times. I said I cannot talk to you anymore. You have asked for a lawyer. You have to have one present now before I can ask you any further questions. He basically begged us to reinterview him. At that point I said well we have some things we are going to have to clarify before we proceed and at that point we did so. * * *

See, it was our intention to cease the interview at the point he had requested an attorney. We decided to continue after he basically, like I said, begged us to continue the interview because he said he had some additional things he wanted to say.

JA at 19-20. The video casts serious doubt upon[19] Morse's claim that Montejo "begged" the officers to re-interview him. And, though Morse testified that Montejo was "not interviewed during the preceding untaped interval" and that "he understood his rights and wished to continue the interview in the absence of counsel," the ten-minute gap in the recording gives way to a tearful Montejo who is covering his head with his hands and moaning: "What am I going? What am I doing? What am I doing?" State's Ex. 17-A. The detectives' behavior and the first-impression created when the recording resumes indicate that the detectives intentionally tried to obtain a retraction from Montejo.

In *Montejo*, this Court again emphasized that "the *Edwards* rule is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." 129 S.Ct. at 2085 (internal citation omitted). That anti-badgering design failed here. After Montejo requested counsel on September 6th, the detectives badgered him into retracting. On September 10th, after Montejo explicitly stated that he did not wish to go on a ride with the police and that he had been appointed a lawyer, a detective falsely informed Montejo that no lawyer had been

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[19] The record reflects that defense counsel was not able to watch the videotape until after Morse's testimony. *See supra* note 15.

appointed. The detectives twice engaged in the very conduct that *Edwards* was meant to prohibit. The Louisiana Supreme Court's rubber-stamp approval of the police conduct is especially difficult to swallow here because this is the case in which this Court overruled *Jackson*'s broader protections and held that the *Edwards* rule would "suffice to protect" "the integrity of a suspect's voluntary choice not to speak outside his lawyer's presence" in the Sixth Amendment context. *Montejo*, 129 S.Ct. at 2090. The pattern of police conduct – specifically, the badgering of Mr. Montejo on September 6th – warrants a summary reversal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. Ben Cohen*
Bidish Sarma

The Capital
Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

Robert Smith

Houston Institute for
Race & Justice
125 Mount Auburn St.
Cambridge, MA 02138

*Counsel of Record for Petitioner

APPENDIX A

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

JESSE JAY MONTEJO

2006-KA-1807 (La. 05/11/10); 2010 La. LEXIS 1219

May 11, 2010, Decided

PRIOR HISTORY:

APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT, PARISH OF ST. TAMMANY, HONORABLE DONALD M. FENDLASON, JUDGE. ON REMAND FROM THE UNITED STATES SUPREME COURT.

Montejo v. Louisiana, 129 S. Ct. 2079, 173 L. Ed. 2d 955, 2009 U.S. LEXIS 3973 (U.S., 2009)

DISPOSITION: AFFIRMED.

COUNSEL: CAPITAL APPEALS PROJECT, G. Benjamin Cohen, Bidish J. Sarma; For Appellant.

James D. Caldwell, Attorney General, Walter P. Reed, District Attorney, Kathryn W. Landry, Special Appeals Counsel; For Appellee.

JUDGES: VICTORY, Justice. Retired Judge Philip C. Ciaccio, assigned as Justice ad hoc, sitting for Chief Justice Catherine D. Kimball.

OPINION

VICTORY, J. *

Jesse Jay Montejo was convicted of the first degree murder of Lewis Ferrari and sentenced to death by a St. Tammany Parish jury on March 10, 2005. This Court affirmed Montejo's conviction and death sentence. *State v. Montejo*, 06-1807 (La. 1/16/08), 974 So. 2d 1238, *reh'g denied*, 06-1807, 2008 La. LEXIS 1092 (La. 3/07/08). The main issue before us on appeal was the admissibility of videotaped statements taken during a police interrogation of Montejo on the day he was taken into custody, September 6, 2002, continuing into the next day, in which Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim who had unexpectedly returned home and interrupted Montejo's burglary. [1]

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* Retired Judge Philip C. Ciaccio, assigned as Justice *ad hoc*, sitting for Chief Justice Catherine D. Kimball.

[1] A description of these statements is found in the Harmless Error section of this opinion, infra, pp. 37-39.

These videotapes were the centerpiece of the State's case. We held that the videotaped statements were admissible, even though Montejo had requested an attorney during the interrogation, because the interview was properly terminated when he requested counsel, his rights were scrupulously honored before he retracted his request for counsel, and he validly waived his rights before the resumption of the interrogation. *Id.* at 1256-1258. In addition, we ruled that a letter of apology[2] written

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[2] The text of the letter is as follows:

Ms. Ferrari,

This is very hard to put in the right words but I will try hard. My soul is feeling you very much. If I could rwind [sic] time I wish that bullet would of hit me. Please finish reading. I really want you to know I had no intention on his death and I am in a lot of true pain I'm so sorry I can picture your heart dropping at sight it is eating me up inside so bad. I try to talk to Loue [sic] every day to say I'm sorry and wish I could let you feel my emotion to know truely [sic] how sorry and how bad this is tearing me up. I promise you I didn't cold blood kill Mr. Loue [sic] if I could change places I would be dead. Please be strong only God really knows why this happen you a beautiful woman and I'm huting [sic] more than you would really expect to know I caused that I did crimes before but I'm really not as harmful as what happen please forgive me Ms. Ferrari I prey for you to be strong and get through I will prey every day I'm accepting God for once in my life and begging for forgiveness I'm so sorry please forgive me I was going for a simple burgulary [sic] in and out that someone put me on and instead I found the gun so I

by Montejo to the victim's wife while he rode with the police to lead them to the murder weapon, after he had been appointed counsel at a 72-hour hearing,[3] was admissible under the Sixth Amendment. While *Michigan v. Jackson*, 475 U.S.

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thought if some reason some one does come in I can scare with the gun and run but he wasn't scared I swear I tried to just run Ms. Fearri [sic] but he wouldn't let me I even fired a warning which skint [sic] him on the side but he still kept coming strong I couldn't see then the shot and he flew back I ran with no ride I grabed [sic] his keys I almost shot myself the gun was cocked back agin [sic] and I didn't know how thats [sic] how scared I was so I shot into the couch I know you needed to know this Ms. Ferri [sic] and may God make you strong pleases I need your forgiveness Ms. Ferri [sic] I'm more than sorry for what happen please forgive me please I'm sorry I lost my life too, my baby my beautiful girl I'm so sorry.

[signature]

Please forgive me Miss. Ferri [sic] may God be with you and make you strong because hes [sic] killing me inside.

9-10-02 8:30 p.m.

[3] A 72 hour hearing is a preliminary] hearing required under state law, in which the defendant is required to be brought before a judge within 72 hours of his arrest for the purpose of appointment of counsel. La. C.Cr.P. art. 230.1(A). The court may also determine the bail or review a prior determination of the bail amount at that time.

625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), forbade police to initiate interrogation of a criminal defendant once he had requested counsel at an arraignment or similar proceeding, we held that because Montejo stood mute at the 72-hour hearing when counsel was appointed, he did not assert his right to counsel and thus the police were not prevented by Jackson from interrogating him once he had been read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Id. at 1260-61.

The United States Supreme Court granted Montejo's writ application to consider whether the letter was admitted in violation Jackson,[4] *Montejo v. Louisiana*, 129 S.Ct. 30, 171 L.Ed.2d 931 (2008), and, after oral argument, solicited further briefing on whether Jackson should be overruled. In a 5-4 opinion, the Court overruled *Jackson* and held that a

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[4] The question presented by Montejo to the Supreme Court was:

> When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

Montejo v. Louisiana, Petition for Certiorari, No. 07-1529 (June 5, 2008).

defendant's rights are adequately protected by the rules announced in *Miranda* and *Edwards* v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (under which a defendant in custody cannot be interrogated once he has asserted his right to counsel unless he initiates further communications with police). *Montejo v. Louisiana*, 129 S.Ct. 2079,173 L.Ed.2d 955 (2009).[5] After overruling Jackson, the Supreme Court remanded the case to this Court, stating:

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[5] The Supreme Court found *Jackson* to be "unworkable" and, in its place, found that the rules that presently preserve the Fifth Amendment right to counsel also would suffice to protect the Sixth Amendment right and thus render *Jackson* "superfluous":

> Under the *Miranda*-*Edwards*-*Minnick* lines of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the Miranda warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached.

Montejo, 129 S.Ct. at 2090 (citation omitted).

Although our holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson*, we think that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of Edwards. If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. *Davis, supra*, at 459. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an "unequivocal election of the right." *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring).

Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections. Our decision today, overruling *Jackson*, changes the legal landscape and does so in part based on the protections already provided by *Edwards*. Thus we think that a remand is appropriate so that Montejo can pursue this alternative avenue for relief. Montejo may also seek on remand to press any claim he might

have that his Sixth Amendment waiver was not knowing and voluntary, e.g., his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer, cf. *Moran*, 475 U.S. at 428, 429. These matters have heightened importance in light of our opinion today.

We do not venture to resolve these issues ourselves, not only because we are a court of final review, "not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005), but also because the relevant facts remain unclear. Montejo and the police gave inconsistent testimony about exactly what took place on the afternoon of September 10, 2002, and the Louisiana Supreme Court did not make an explicit credibility determination. Moreover, Montejo's testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence. These matters are best left for resolution on remand.

Montejo, 129 S.Ct. at 2091-92. Defendant's rehearing application was denied on July 27, 2009. *Montejo v. Louisiana*, 130 S.Ct. 23, 174 L.Ed.2d 606 (2009).

In accordance with the Supreme Court's ruling, on September 4, 2009, this Court issued a briefing notice, ordering the parties to address the following "regarding the admissibility of the letter of apology written to the victim's wife, Pat Ferrari, on September 10, 2002:"

> (1) whether defendant, Jesse Jay Montejo, made a clear assertion of the right to counsel for purposes of the rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), when the officers approached him about accompanying them on the excursion for the murder weapon;
>
> (2) if Montejo did make a clear assertion of his right to counsel at that time, whether Montejo initiated further communication, exchanges, or conversations with the officers prior to writing the letter;
>
> (3) if Montejo waived his Sixth Amendment right to counsel, whether this waiver was knowing and voluntary;

> (4) if the trial court erred in admitting the letter, whether the admission of the letter constituted harmless error.

State v. Montejo, 06-1807 (La. 9/04/09) (unpublished).

After considering the record and the arguments of counsel on remand, we find that Montejo's arguments on remand are precluded under state law because he did not raise them at the trial court in a motion to suppress. Although a reviewing court may consider trial testimony in determining whether a motion to suppress should have been granted, that jurisprudential rule only applies where a defendant has raised the grounds to which that testimony relates in a motion to suppress. Montejo did not argue that the letter should have been suppressed because he made a clear assertion of his right to counsel on September 10, 2002, such that the protections of *Edwards* would apply, or that his subsequent waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer, as grounds for suppressing the evidence in the district court; therefore, his testimony at trial came too late to affect the admissibility of the letter under state law. In addition, any error in admitting the letter was harmless. Accordingly, we reaffirm Montejo's conviction and death sentence.

REVIEW OF THE RECORD ON REMAND[6]

On September 23, 2003, Montejo filed a brief boilerplate motion to suppress all inculpatory statements.[7] At hearings on the motion to suppress, Detective Wade Major testified that he and Detective Bobby Juge took Montejo out of jail on September 7, 2002, and transported him to the Hwy. 11 bridge to show them where he claimed to have thrown the murder weapon. Montejo accompanied them voluntarily to help them find the gun so that he

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[6] The following review relates only to the issues on remand. For a complete discussion of the facts of this case, see our opinion on original hearing, *State v. Montejo*, *supra*, and pages 33-41 of this opinion on remand, *infra*.

[7] The motion to suppress stated as follows:

> Defendant moves to suppress for use as evidence all oral or written inculpatory statements obtained from defendant by all law enforcement officers or other agents of the State in the above-captioned cause.
>
> All of said confessions and other inculpatory statements are inadmissible in evidence because they were not made by defendant to said law enforcement officers or anyone else freely and voluntarily, but were made under the influences of fear, duress, intimidation, menaces, threats, inducements, and promises, and/or without mover having been advised of his Constitutional rights to remain silent, right to counsel, etc.

could prove that he used the victim's own revolver, which he found in the course and scope of the burglary, rather than a weapon that he brought with him. At the same hearing, Detective Jerry Hall described three follow-up visits that he conducted with Montejo at the jail on September 10 after divers were unable to find the murder weapon. Detective Hall testified that on none of these visits did Montejo request a lawyer, mention that he was represented or had attended a 72-hour hearing that morning, or indicate that he did not wish to speak with detectives. In fact, on one of these follow-up visits, Detective Hall "inquir[ed], have you been contacted by counsel?" to which Montejo responded "no, I don't need one .... I just want to clear all this up." The first two visits, at 8:45 a.m. and noon, were very brief. At some point during the third, 2:45 visit, Montejo agreed to accompany Detectives Hall and Dale Galloway on the next expedition, which may have commenced around 5:00 p.m. During that excursion, Montejo indicated that he had discarded the money bag in a garbage dumpster at a shell station in Gretna. The detectives transported Montejo to that Shell station and were preparing a warrant to search the dumpster when they discovered it had been emptied the previous day. Detective Hall also testified Montejo executed a handwritten statement during this expedition at 7:15 p.m. to memorialize his voluntary cooperation in these activities.[8] After

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[8] Although Detective Hall did not mention this in his testimony, Montejo also drafted the letter of apology at this

Detective Hall completed his testimony on April 20, 2004, defense counsel informed the court that he would likely wish to call the defendant to testify at a subsequent hearing in support of his motion to suppress, but he would like to defer that decision until after the videotaped statement taken on September 6-7 [in which Montejo eventually confessed to the crime] was reviewed.

At a subsequent suppression hearing on June 1, 2004, Detective Hall testified that he did not know on September 10, 2002, that an attorney had been appointed that morning to represent Mon-tejo. He did not learn this until the early evening, when he received a call telling him that an attorney was looking for him. Detective Hall was in the sally port[9] bringing Montejo back to the jail when he received this call. According to Detective Hall, Montejo did not reveal that he had been to court that morning and never indicated that counsel had been appointed. Detective Hall testified that he had asked Montejo on September 10 whether he had been contacted by an attorney or whether his family had secured an attorney for him, and Montejo responded "no, I haven't heard from anybody, nobody at all." Immediately after this testimony, Montejo's counsel

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time.

[9] A sally port is a secured area with controlled ingress and egress which serves as a passageway for persons entering or exiting the jail.

declined the opportunity to re-examine Detective Hall and presented no witnesses to rebut this testimony. No other evidence was presented on the motion to suppress.

At the close of the suppression hearings, defendant's arguments were directed solely at the statements obtained during the September 6-7 interviews, specifically that Montejo's clear invocation of his Fifth Amendment right to counsel during the September 6-7 interrogation was captured on video, that his request was not scrupulously honored, that detectives reinitiated questioning, and that the subsequent waiver was invalid. He made no arguments regarding the September 10 events or the letter. In response to further prompting from the district court to "state . . . the issue before the Court," defense counsel again focused solely on the September 6-7 mid-interrogation invocation without any reference to the events that occurred on September 10 or any Sixth Amendment claim. Therefore, the district court had to inquire whether there were not in fact two questions before the court: "namely, should the statement of the defendant that was videotaped in Slidell, should that be suppressed, and secondly, should any statement or information obtained by Detective Jerry Hall on September 10th be suppressed .... Isn't that what is before the Court, gentlemen?" Defense counsel simply agreed. In the ruling that followed, the district court ruled that the September 6-7 videotaped statements were admissible, and that the September 10 letter was

also admissible, reasoning "the fact that an attorney is appointed in a 72-hour hearing does not tacitly convey to all of the force [that] a defendant has an attorney or if he does have an attorney it certainly doesn't prevent that defendant from exercising his own constitutional rights and giving up those rights." The district court denied the motion to suppress. On the morning before trial, out of the presence of the jury, defense counsel remarked that his client's decision to testify was based, in part, on the denial of his motion to suppress, stating:

> First and foremost, I want to reiterate what I believe I have said on the record earlier in the week, that my decision regarding Mr. Montejo taking the witness stand and disclosing his prior criminal record to the jury was based upon the Court's rulings earlier in the week, and also upon the Court's ruling's early, earlier regarding the motion suppress. Had the motions been granted, I likely wouldn't -- I certainly would not have put him on the witness stand.

Trial commenced, and the following references to the letter and the events of September 10 were made. The State mentioned Montejo's apology letter once during opening remarks. Between a lengthy description of the September 6-7 interrogation (in which the State emphasized Montejo's delaying tactics, savvy alterations to his story, and bluffing)

and a brief mention of the DNA evidence (as the last piece of the puzzle),[10] the State made the following comment:

> Detective Jerry Hall - remember the Sheriff's Office? He's got the dive team out there trying to find the gun. The defendant has given them different versions of where this gun is. He signs out Montejo, gives him a rights form, three days of searching, no gun. He is directed by Montejo to a dumpster which is supposed to have the bank bag. And most importantly, on the way back in, I'm so sorry.
>
> The defendant executes, and asks, can I have a pen and some paper, I want to write a letter, I want to write a letter to this lady and tell her I'm sorry, I am so sorry. And the defendant proceeds in his own handwriting to write a heartfelt letter describing how it was all an accident, it shouldn't have happened this way and he feels sorry.

The State then referred to the events of September 10 twice during the presentation of its case. A brief

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[10] Montejo's DNA was found under the victim's left fingernail. See infra, pp. 35-36.

mention is made during the testimony of Deputy John Morris after he described the failure of divers to find the murder weapon:

> Q. Subsequent to that, were you aware of officers interviewing Mr. Montejo on September 10th, 2002?
>
> A. Yes.
>
> Q. What was the purpose of that follow-up interview?
>
> A. They were bringing him out to, I believe, to a gas station over in the West Bank at that particular time.

On cross, Deputy Morris clarified that he, as lead investigator, sent the detectives to take Montejo out of jail on September 10 and he denied that he was aware that counsel was appointed that morning.

The events of September 10 are not mentioned again during the State's case until their final witness, Detective Hall, testified. He testified that he conducted follow-up interviews with Montejo on September 10 because divers could not find the murder weapon in the location Montejo provided. He identified the signed waivers that Montejo had executed at the beginning of each visit. He described these visits as follows. First, Detective Hall visited Montejo in the morning, briefly inquired into his well-being, and did not "press him at all on the

investigation." Later in the afternoon, after the execution of the 2:45 p.m. waiver, Montejo accompanied him and Detective Galloway to the Hwy. 11 bridge. Detective Hall testified that while on the bridge, Montejo claimed he had disposed of evidence, that he previously claimed he burned, at a gas station in Gretna and he agreed to show the detectives the location. The detectives provided Montejo with paper and pen so that he could write a brief statement explaining that he was voluntarily accompanying the officers to search for evidence at the gas station. No evidence was recovered at the dumpster as it had recently been emptied. However, Detective Hall testified that on the ride back to jail, Montejo requested pen and paper again because he said "he wanted to wanted to write something." Montejo then, at about 8:30 p.m., wrote the letter addressed to the victim's widow. Detective Hall identified this letter but did not describe its contents. When they arrived back at the jail, he was directed to meet with an upset public defender. Throughout his testimony, on direct and cross-examination, Detective Hall maintained that all waivers, statements, and handwritten notes were produced by Montejo voluntarily and without coercion, and that Montejo never requested the assistance of an attorney. On cross-examination, in suggesting that detectives dictated the letter Montejo wrote, which the defense described as either a "confession" or an "apology," defense counsel directed the jury's attention to its contents:

Q. Direct your attention to State's Exhibit Number 76, at the very bottom. "I am so sorry, please forgive me." Would you read the next sentence that he writes, to the ladies and gentlemen of the jury, after you have read it to yourself?

A. May I --

Q. Where it says, four lines from the bottom, "I am so sorry, please forgive me."

A. Okay.

Q. Would you read the next sentence to the ladies and gentlemen of the jury?

A. "I was going for a simple burglary, in and out, that someone put me on, and instead I found the gun so I --"

Q. What is the simple burglary?

A. Under the laws, simple burglary is when you break into an inhabited motor vehicle or dwelling or structure belonging to another.

Q. It's a legal term, isn't it?

A. Yes.

> Q. Simple burglary as opposed to aggravated burglary or unauthorized entry, it's a legal term contained in the law books?
>
> A. Yes.
>
> Q. You are telling me that this man over here -- and it's a Louisiana term -- there's no simple burglary in Texas or Florida or Alabama, it's a term indigenous to Louisiana. You're telling me this man over here when he is writing that letter, without any prompting from any police officer, writes in the letter I was going for a simple burglary. Is that your testimony, sir?
>
> A. He wrote it, sir.

On redirect, the State referred Detective Hall to more of the letter's contents:

> Q. -- let me show you that paper, the apology letter. We will call it an "apology letter" for purposes of this discussion. Did you also tell him, [Pg 12] I promise you I didn't cold-blooded kill him, Mr. Lou, did you tell him to write that in his statement?
>
> A. I didn't tell the man to write anything, sir.

> Q. Did you tell him to write in his statement, forgive me, Mrs. Ferrari?
>
> A. No, sir.
>
> Q. Did you tell him to say, I need your forgiveness, Mrs. Ferrari, I am more sorry for what happened, please forgive me? Did you say put that in your letter, Mr. Montejo, make sure you write that in your letter?
>
> A. No, counselor, I did not.

At the close of the State's case, the State's exhibits, which presumably included the apology letter, were published to the jury.

The defense called three witnesses, Deputy Morris,[11] Montejo, and Mary Melancon. Montejo testified about the events of September 10 as follows:

> Q. All right. Now, on September the 10th in the morning, do you remember being brought into the video room?
>
> . . .

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[11] Deputy Morris had already testified on behalf of the State.

A. Yes, sir.

Q. Do you remember having a seventy-two hour hearing?

A. Yes.

Q. You know what a seventy-two hour hearing is?

A. Now, I do, to -- I know what it means now. At that time they advised me of what I was charged with, and told me I had appointed counsel.

Q. And that was before Hall and Major came and got you later that day, isn't it?

A. Yes, sir.

Q. Now, the judge advised you, was he there in person or on the television?

A. He was there in person, sir.

Q. All right. And the, the IDP was appointed?

A. (No response)

Q. Did you know what that meant?

A. No, sir.

Q. Did you know that was a lawyer that was appointed for you?

A. He said, he said he was appointing counsel in whichever words he said it in and basically got the message to me that somebody was appointed to me.

Q. Now, when Major and Hall came to get you that afternoon, what did they tell you?

A. They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me. He said, No, no you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't. He said, I checked, you don't have a lawyer appointed to you.

Q. Who said that?

A. That was the one that was sitting here, Hall.

Q. All right. What did you say when he said that?

> A. I was like, Well, I thought I had one appointed to me. He is like, No. He is like, I need you to come with me, will you come with me. At which time I was like, okay. Back then in them days, in the two-and-a-half years ago, I had a very gullible character, I was very easily led. I mean, it is obvious. Everybody seen it for their self. Everything that these police have said or did I followed right then. I was --
>
> Q. All right.
>
> A. -- very easily taught. You could tell me anything.

Montejo testified that he then went with detectives to the bridge and pointed out a different spot for them to search to placate Detective Hall. He tried to further placate them by taking them to the Shell station on the West Bank:

> Q. Now, did you point out a Shell gas station?
>
> A. Yes, I did. And the reason why I did that is because he told me, he said, look, we searched I-10, we searched the interstate, you know, there is not one sign of the bag being burnt nowheres as that dumpster, and there's nothing on I-10. And I told him, well, causes I really

didn't have it, and that then again, he then got mad again. He said, where is it? And I told him, all right, it was at a Shell station.

Finally, he described how detectives prompted him to write a letter of apology to the victim's wi-dow:

Q. Did they tell you what to write?

A. Sir, it was Detective Hall's suggestion to write apology letter, and during his suggestion, he told me, you know, just let them know, why you are apologizing that it wasn't intended to be an aggravated burglary, that it was supposed to just be a simple burglary, and he popped up on it.

Q. Do you know what a simple burglary is?

A. At that time I did not. An when he said it, it sounded like just plain, you know, like --

Q. Like an easy burglary?

A. A simple burglary, yeah. That's that's what it sounded like to me when he said that. I didn't realize until after I've been here so long that a simple burglary is actually a statute.

Q. So that's his suggested words to you?

A. Yes, sir, say that it was a simple burglary. And at -- when I wrote the letter, Hall didn't stand next to me, though. It was Galloway, Detective Galloway sat next to me, and at that time, when I am making this apology letter, I really do in my heart, I feel sorry for the family, and I apologize to the whole family for what happened. I swear to God I felt sorry for that. They -- I can't, I was really, really apologizing to the family in that letter, because I was really sorry for what happened, period. I know I didn't do it, but I am still very sorry for what happened.

And I was writing that apology letter and Galloway was sitting next to me, and I would write a couple of lines, he would say just that you didn't have no intentions, and I would put that, but then I would keep going on apologizing, and that's when he said, remember what Hall said, just write that it was a simple, a simple burglary, meant to be a simple burglary, I came upon on it, that's when I wrote that.

And then he began, on the next page, Galloway was telling me, well, just tell her a little bit about what happened, let

> her know that you was in there and you found the gun and he came home on you, and you tried to knock him out but -- with the gun, but, you know, he kept fighting, and, you know, and so I wrote that as -- I was basically writing everything he was telling me, along with some of my own personal apologies.

The third witness, Mary Melancon, a family friend, testified that she visited Montejo in jail and that he told her the same story then that he testified to at trial.[12] The State briefly referred to the apology letter during her cross-examination:

> Q. Do you recognize Jesse's handwriting?
>
> A. No, I couldn't tell you I would recognize it. I mean, I have gotten a couple, maybe two, two letters from

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[12] At trial, defendant testified that he was innocently present in the victim's home when the crime was committed by a black male from the Fisher Projects, who was known only by his tattooed initials "D.P." D.P. forced Montejo at gunpoint to take some of the proceeds of the crime and then flee in the victim's car as D.P. shot and killed Mr. Ferrari. According to Montejo, he initially thought it best to blame Jerry Moore and then later take the blame for the crime himself because D.P. was a dangerous man who knew where Montejo and his family lived and who had threatened to kill them all if Montejo talked to police. See infra, pp. 40-41.

> Jesse. I couldn't tell you I would know it. I mean, if I saw it, I probably could tell you. It was kind of like a large print, very nice handwriting.
>
> Q. State 76 and 75, does that appear to be his handwriting?
>
> A. If I had my letter to compare it to, I could tell you, but I don't have the letter to compare it to. If I had know, I would have looked at the letter he has written me, be-cause I do have it.
>
> Q. So you have never read these two letters that he wrote to the police and Ms. Ferrari?
>
> A. No, I didn't even know that these existed. If he told me, I don't remember.

Finally, the State indirectly raised the specter of the apology letter in its closing remarks. The state depicted Montejo as a liar who was ironically truthful when he testified that his "I am so sorry version" of the crime was a lie because, according to the State, Montejo waited for the victim to arrive home to rob him and then killed him rather than leave a witness behind. The defense in closing accused the detectives of deception and then addressed the apology letter directly:

It is amazing to me that this investigation had so many typos. Detective Hall, I have got the wrong day. Detective Morris, I have got the wrong time, which brings us to the State's Exhibit Number 76, the so-called apology letter. This to me, as someone who pretty much my entire legal career has been in the criminal justice system, this jumped out at me more than anything else that I saw. In this letter, at the very bottom, where he begs forgiveness -- and he tells you the police told him what to say -- "I was going for a simple burglary,"

I introduced Defendant's Exhibit Number 6, which is page 42 of the Louisiana Code of Criminal Procedure, has all the laws regarding procedure, the statutory laws. Title 14:62 is simple burglary. Now, folks, the judge told you none of these things you can take back. These written items, you can't take the tape back. So I am going to kind of remind you of this again. You all looked at it yesterday.

You know, if somebody didn't know too much about law enforcement. You know, certain crimes in Louisiana have the preface "simple". There's simple burglary, there is simple arson, there is

simple robbery, you know. Those are pretty bad crimes, you know. Why the term "simple"? There's nothing simple about a burglary. But that's the way the legislature drafted it. It is not simple, like it's easy. It is simple because that's what the statue says. Do you think he reviewed the Louisiana Code of Criminal Proce-dure before he wrote that letter? Where did simple burglary come from?

You know what? There is probably not one single person here, including the cops that took this statement, that knew what happened, that don't believe that that information was supplied to him. How else can you explain it? He writes simple burglary, somebody told him simple burglary. Somebody told him a lot of different things. There is no other way to explain that, ladies and gentlemen.

If you take that one fact. and I don't expect that Mr. Gracianette is going to get up here and challenge this at all, like he did when he tried to say -- to have Hall say, well, you mean, simple, like it was easy. Nobody, other than a child, is going to think, but that this is not what happened.

> So, folks, I will leave you with this: If you believe that simple burglary was pro-vided to him by the police, then take that point in time and go backwards with it and think what else did they say and what else did they do in this case. Was that proper? It was absolutely improper. And proof of that is that they denied doing it, but they did it. There's simply, no -- folks, when you go back, you know, at some point talk about what I am suggesting to you. And if they did that, is it so hard to believe that he told them he wanted a lawyer, they said you get a lawyer later, that they intimidated him, they suggested what to say.

The State then rebutted the defense's argument as follows:

> [T]he last point that Mr. Williams made to you was that the finest of St. Tammany Parish police officers lied, deceived you, because they coerced an apology letter from the defendant.
>
> Now, you know that is not to be true, but what he claims is the basis for that conclusion is the reference in this letter to the term "simple burglary" and that admission by Mr. Montejo. You believe that? Because if you think the police

> officers are trying to extract a confession out of him to fit their case, you think they would do a better job of it. Because, you know, under the law, State of Louisiana, for the crime of first degree murder to be committed, it doesn't take place during the commission of a simple burglary. It requires the commission of an aggravated burglary. That's the law.
>
> And if the police officers really wanted to build their case and they really wanted to make this confession a good one, they would have included not a simple burglary, which doesn't fit the crime of first degree murder, they would have said, Jesse, put in aggravated burglary and armed robbery.

The apology letter and the events of September 10 were never mentioned during in the jury instructions nor during the penalty phase. The admission of the apology letter was, however, one basis asserted in Montejo's motion for new trial:

> Defendant additionally claims as error the introduction of a handwritten statement taken from him by investigators on September 10, 2002. Prior to being questioned on this date, defendant had appeared in court for a 72 hour hearing and counsel was appointed to represent him.

> In *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), the U.S. Supreme Court held that the right to counsel attaches when "judicial proceedings have been initiated" against the defendant and that once adversary proceedings have commenced, the defendant "has a right to legal representation when the government interrogates him." The Williams court rejected the State's argument that the defendant's confession was legal because he had failed to explicitly assert this right to his interrogators. In light of *Williams* and progeny, it was illegal for interrogators to remove defendant from jail and interrogate him without counsel present, regardless of whether defendant asked for a lawyer. It was therefore error for this Court to admit such evidence, and this error should entitle defendant to a new trial.

As noted above, the defendant did not present any evidence, or argument, at the motion to suppress that he asserted his right to counsel for Edwards purposes on September 10, that the police lied to him about not having a lawyer, or that the police kept him from seeing his lawyer.[13] However,

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[13] Regarding the events of September 10, Montejo argued to this Court on original hearing only that his Sixth

Montejo contends that the only concern that was pertinent to the apology letter when he sought to suppress it pre-trial was whether he was entitled to the protection of *Jackson*. Now that the Supreme Court has eliminated this protection, he argues that this Court should remand to the district court for hearings in which he can inquire further into the following questions: (1) whether he requested counsel at his 72-hour hearing; (2) whether he invoked his right to counsel when he was approached at the jail on September 10; (3) whether he was properly Mirandized by detectives before he left the jail with them on September 10; (4) whether detectives knew that he had been appointed counsel at his 72-hour hearing; and (5) whether police removed him from the jail on September 10 to keep him away from appointed counsel. Montejo contends that the record is inadequate to answer these questions because he relied on the protection of *Jackson* and he suggests that this Court lacks jurisdiction under La. Const. Art. V, § 5(C) to make the factual determinations that are now necessary under the Supreme Court's ruling. Montejo

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Amendment right to counsel had attached at the time of the 72-hour hearing and therefore police could not initiate questioning of him. He made no argument to this Court that he asked for a lawyer on September 10; however, he did argue that any subsequent waiver of his right to counsel was unknowing because he did not know an attorney had been appointed, referring to his trial testimony that the police told him he did not have an attorney.

emphasizes that the Supreme Court declined to resolve these issues, in part, "because the relevant facts remain unclear." *Montejo*, supra, 129 S.Ct. at 2092.[14] The State, however, points out that the Supreme Court also recognized that "Montejo's [Pg 19] testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence." Id. Thus, the State argues under state law, because Montejo has never claimed until now that he asserted his right to counsel on September 10 or the police misled him as basis for suppressing the apology letter, he is barred from pursuing those claims now. The State disputes Montejo's assertion

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[14] In the alternative, defendant claims that the record as presently constituted proves that the detectives obtained the letter by deceitfully keeping him from his appointed counsel in violation of *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). Further, he alleges that his trial testimony was unrebutted and indicated a clear assertion of his right to counsel such that Edwards would have protected him from further interrogation, and that the State failed to prove any subsequent waiver was voluntary when viewed in the context of his entire interaction with police beginning on September 6, coupled with Det. Hall's deceit in telling him he did not have a lawyer. In addition, Montejo argues that the Miranda form used on September 10 was inadequate because it indicated an attorney "will be appointed" in the future, when in fact an attorney had already been appointed. Finally, he characterizes the apology letter as a full confession that was the dispositive piece of evidence against him that can therefore not be found to constitute harmless error.

that the only pertinent claim before the Supreme Court's ruling arose from Jackson and argues that, under the jurisprudence at the time of the suppression hearing, any clear invocation of his right to counsel or involuntary or unknowing waiver would have provided an independent basis to suppress the apology letter, which claims defense counsel would have pursued if facts existed to support them. In addition, the State claims that any error in admitting the letter was harmless.

DISCUSSION

State Law Requirements for a Motion to Suppress

The provisions of La. C.Cr.P. art. 703 govern the procedures for a motion to suppress. That article provides that a "defendant adversely affected may move to suppress any evidence for use at the trial on the merits on the grounds that it was unconstitutionally obtained" and "may move on any constitutional ground to suppress a confession or statement of any nature made by the defendant." La. C.Cr.P. art. 703(A) and (B). The motion must be filed in accordance with La. C.Cr.P.art. 521, which provides it must be filed within 15 days of arraignment or whatever date is set by the court for the filing of such motions, "unless opportunity therefor did not exist or neither the defendant nor his counsel was aware of the existence of the evidence or the ground of the motion, or unless the failure to file the motion was otherwise excusable." La. C.Cr.P. art. 703(C)(emphasis added). "The court

in its discretion may permit the filing of a motion to suppress at any time before or during the trial." La. C.Cr.P. art. 703(C). At the trial of the motion, "the burden of proof is on the defendant to prove the ground of his motion, except that the state shall have the burden of proving the admissibility of a purported confession or statement by the defendant...." La. C.Cr.P. art. 703(D); La. R.S. 15:451 (before the state may introduce a confession into evidence, it has the burden of proving that the statement was free and voluntary and not in-duced by threats, promises or coercion). If a statement is a product of custodial interrogation, the state additionally must show that the person was advised before questioning of his right to remain silent, that any statement he makes may be used against him, and, that he has a right to counsel either retained or appointed. *State v. Blank*, 04-0204 (La. 4/11/07), 955 So. 2d 90, 103. Where the defendant alleges police misconduct in reference to the statement, the state must specifically rebut these allegations. *State v. Vessell*, 450 So. 2d 938, 942-43 (La. 1984). A hearing on the motion shall only be held "when the defendant alleges facts that would require the granting of relief." La. C.Cr.P. art. 703(E)(1).

The defendant may testify at the motion to suppress without being subject to interrogation into other matters and his testimony cannot be used by the state at trial except to attack the credibility of his testimony at trial on the merits. La. C.Cr.P. art. 703(E)(1). If the defendant testifies at trial, he can

be cross-examined on the whole case. La. C.Cr.P. art. 703(E)(2).

The rules further provide that "[a] ruling prior to trial on the merits, upon a motion to suppress, is binding at the trial" and "failure to file a motion to suppress evidence in accordance with this Article prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress." La. C.Cr.P. art. 703(F) (emphasis added). Finally, subsection (G) provides:

> When a ruling on a motion to suppress a confession or statement is adverse to the defendant, the state shall be required, prior to presenting the confession or statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement.
>
> A ruling made adversely to the defendant prior to trial upon a motion to suppress a confession or statement does not prevent the defendant from introducing evidence during the trial concerning the circumstances surrounding the making of the confession or statement for the purpose

> of enabling the jury to determine the weight to be given the confession or statement.

La. C.Cr.P. art. 703(G).[15] The trial court is afforded great discretion in ruling on a motion to suppress, and its ruling will not be disturbed absent an abuse of that discretion. *State v. Lee*, 05-2098 (La. 1/16/08), 976 So. 2d 109, 122.

Read in conjunction, and with reference to each other, these provisions allow a defendant to object to the admission of a confession by the filing of a motion to suppress on any constitutional grounds. He must file this motion within the time limitations set by the trial judge, which may even be during the trial on the merits, and must assert the constitutional grounds under which the confession

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[15] "This statutory rule has its underpinnings in the Due Process Clause and it necessarily operates independently of any credibility determination the trial court may have made in ruling on the voluntariness of a statement as a matter of law." *State v. Williams*, 01-1650 (La. 11/1/02), 831 So. 2d 835, 843 (citing *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986)). In Green we found that the trial court erred in refusing to allow defendant to present additional testimony at trial concerning his request for counsel before he confessed. 831 So. 2d at 843. The trial court found that the issue of voluntariness was decided at the motion to suppress and was therefore *res judicata*. We found that the evidence should have been allowed under La. C.Cr.P. art. 703(G) to determine the weight to be given the evidence. *Id.*

must be suppressed and the facts entitling him to relief thereunder. The only exception to this rule is if the defendant or his counsel was unaware of the evidence or the ground of the motion, or the failure was otherwise excusable. A ruling on the motion is binding at trial and the defendant may not object to its admissibility at trial on a ground that was assertable by a motion to suppress. He may, however, present testimony at trial surrounding the making of the confession for the purpose of enabling the jury to determine the weight to be given the statement.

Louisiana courts have long held a defendant may not raise new grounds for suppressing evidence on appeal that he did not raise at the trial court in a motion to suppress. *State v. Brown*, 434 So. 2d 399 (La. 1983) (rejecting defendant's alternative argument regarding the denial of his motion to suppress because he had not raised the issue at trial); *State v. Johnson*, 07-1040 (La. App. 4 Cir. 9/10/08), 993 So. 2d 326 ("failure to raise a ground for suppressing an item of evidence in a properly filed motion to suppress waives such a basis for exclusion on appeal"); *State v. Jackson*, 04-1388 (La. App. 5 Cir. 5/31/05), 904 So. 2d 907, writ denied, 05-1740 (La. 2/10/06), 924 So. 2d 162 (defendant is limited on appeal to the grounds he articulated at trial and a new basis for a claim, even if it would be meritorious, cannot be raised for the first time on

appeal);[16] see La. C.Cr.P. art. 841 (providing that a new basis for an objection cannot be raised for the first time on appeal).

We have previously considered the problems arising when a party does not file a motion to suppress, and then later testifies at trial as to facts that suggest the evidence should have been suppressed. *State v. Lipscomb*, 00-2836 (La. 1/25/02), 807 So. 2d 218 and *State v. Watson*, 00-1580 (La. 5/14/02), 817 So. 2d 81. In *Lipscomb*, the defendant alleged on appeal that his attorney at trial provided ineffective assistance of counsel by failing to file a motion to suppress evidence. This Court found ineffective assistance claims are to be considered in post-conviction proceedings and not on appeal, and, in so holding, explained the reasons why motions to suppress are required pre-trial:

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[16] In *Jackson*, the court found that while the defendant challenged the voluntariness of his confession, neither his written motion nor the evidence presented at the motion hearing alleged that the statement was involuntary because of his young age or because he was sleep deprived at the time of the statement. The defendant was not allowed to raise these new bases for suppression of his statement for the first time on appeal, and therefore, they were not properly before the appellate court.

> [T]he constitutional validity of a seizure is ordinarily a matter for the court to determine in the context of a pre-trial motion to suppress if counsel elects to file one. La. C.Cr.P. art. 703. This requirement insures that "all disputes over police conduct unrelated to the guilt or innocence of the accused are eliminated from the jury trial' and thereby avoids unwarranted delay and jury confusion. *State v. Christian*, 26,589 (La. App. 2 Cir. 1/25/95), 649 So. 2d 806, 808, writ denied, 95-0791 (La. 9/15/95), 660 So. 2d 448.

807 So. 2d at 219-20. The Court recognized that "with the constitutional validity of the search not at issue, neither the state nor the defense had any particular need to delve in detail into the circumstances surrounding [the officer's] seizure of the evidence." *Id*, at 221. In the similar case of *State v. Watson*, supra, a police officer testified at trial explaining the circumstances which led to the seizure of drugs and defendant's arrest. The defendant then testified, in contrast to the officer's testimony, that the officers pulled him off his bike, questioned him and beat him before arresting him. The appellate court properly found the defendant was estopped from raising the issue that the evidence should have been suppressed as counsel did not raise the issue in a motion to suppress; however, it reversed the conviction on an ineffective assistance claim. *State v. Watson*, 99-0243 (La. App. 4 Cir.

5/3/00), 763 So. 2d 713. This Court reversed, again finding an ineffective assistance claim was better reserved for post-conviction. We explained that a motion to suppress is required so that a full evidentiary hearing can be held to address the issue and that a defendant is not allowed to first bring these claims up after the State has rested its case:

> In this case, the question of the constitutional validity of the seizure of [the evidence] was not at issue in the trial court. Thus, when the State tried this matter, its witnesses were not required to elaborate on why they stopped the defendant. Accordingly, neither the State nor the defendant had any need to scrutinize the detailed circumstances surrounding the seizure of [the evidence] and explore the evidence attendant to that police action. Therefore, the trial testimony of [the officer] focused only on the State's burden to establish beyond a reasonable doubt that the defendant possessed the heroin.

817 So. 2d at 84.

That is similar to what happened in this case. Defendant never raised the claim to the trial court in a motion to suppress that the letter should have been suppressed because he asserted his right to counsel when approached by police on Sept. 10 or the

police misled him to thinking he did not have a lawyer. Although the burden of proof was on the State on the trial of the motion to prove its admissibility, the defendant must raise all grounds for suppression of the evidence that are knowable or available at that time. The defendant bears this burden in order to give the State adequate notice so that it may present evidence and address the issue at trial on the motion. Because Montejo did not raise these grounds in a motion to suppress or allege facts supporting those grounds, the State had no need to put on evidence tending to show that defendant never made a clear assertion of his right to counsel or that the police never misled him. It simply put on evidence at the motion hearing as required by La. C.Cr.P. art. 703(D) and La. R.S. 15:451 that the letter was admissible, and put on evidence at trial as required by La. C.Cr.P. art. 703(G) concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement. Thus, the officers only testified at the suppression hearing and at trial that basically they asked if he had a lawyer, he said no, and then they read him his rights. It was not until the defendant testified at trial that he told the police he thought he had a lawyer and they told him he did not, that this potential Edwards violation and waiver issue was ever even alluded to. The State had no need, and was not required, to rebut this testimony because the evidence had already been admitted and it had never been claimed that the letter was obtained illegally on those grounds. See

State v. Joseph, 434 So. 2d 1057, 1061, n.3 (La. 1983) (where defendant testified at trial that confession was beaten out of him and court had already ruled the statement was admissible in motion to suppress, because that ruling was binding at trial under La. C.Cr.P. art. 703, the. state was not obligated to present rebuttal evidence to "rehabilitate" the confession).

As stated earlier, the Supreme Court recognized in remanding the matter that "Montejo's testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence." The defendant argues under Louisiana law, in reviewing the trial court's ruling on a defendant's motion to suppress, this Court has stated that it will look to the totality of the evidence presented at the motion to suppress hearing and the trial. *State v. Burkhalter*,428 So. 2d 449, 455 (La. 1983); *State v. West*, 408 So. 2d 1302,1308 (La. 1982) ("Although the state put on no evidence at the hearing on the motion to suppress, we look to the totality of the evidence produced both at that hearing and at trial when we assess whether the state has carried its burden"). However, this jurisprudential rule will only be applied where the defendant has filed a motion to suppress alleging a statement was inadmissible on a specific constitutional ground and later a reviewing court looks to his trial testimony, in addition to the testimony presented at the motion hearing, to determine whether the motion to

suppress should have been granted on those grounds. The jurisprudential rule is not applied where the grounds for suppression were not asserted in the motion to suppress.[17] We have never allowed a defendant to allege facts for the first time in trial testimony which would support a new argument for suppression of evidence, and have a reviewing court consider those facts in determining whether the district court should have granted a motion to suppress on grounds that were never argued to, or considered by, the district court. This is prohibited by La. C.Cr.P. arts. 703 and 841 and would allow rejection of the district court's determinations at the suppression hearing without any indication of abuse of discretion.[18] We agree with the State that "the entire criminal justice system will become chaotic if

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[17] For instance, in *Hurkhalter*, we stated that we would look to testimony presented at the motion to suppress and at trial; however, the testimony at trial was the same as that presented in support of the motion. In *West*, we looked to trial court testimony presented by the state because the state put on no evidence at the motion to suppress as required by La. R.S. 15:451.

[18] This would also potentially constitute a technical trap for an unwary prosecutor in a case like the instant one in which a defendant does not testify on a motion to suppress but reserves his claims of police misconduct for trial to undercut the weight given the statement by the jury. A prosecutor may not deem that testimony worthy of specific rebuttal in front of the jurors and may rest on general disclaimers by the officers involved in the interrogation.

the Court allows defendants to withhold testimony which they allege is relevant to a suppression issue until the end of trial after the evidence has been admitted, then raise the issue on appeal, when the trial court has had no opportunity to rule with all evidence before it."

In summary, under state law cited above, a defendant must allege the grounds on which he claims that evidence should be suppressed in a motion to suppress: "Failure to file a motion to suppress evidence in accordance with this Article prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress." La. C.Cr.P. art. 703(F). The only exception to this is if "opportunity therefor did not exist or neither the defendant nor his counsel was aware of the existence of the evidence or the ground of the motion, or unless the failure to file the motion was otherwise excusable." La. C.Cr.P. art. 703(C).

Thus, the answer to the Supreme Court's query regarding whether defendant's testimony came too late to affect the admissibility of the evidence because it came at trial, and not at the suppression hearing, is tied to the rules governing the motion to suppress, and depends upon whether the defendant or his counsel were aware of the "ground of the motion" at the time when *Jackson* was still good law. The Supreme Court expressed its opinion that "Montejo should be given an opportunity to contend that his letter of apology

should still have been suppressed under the rule of Edwards" and that "Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections." *Montejo, supra*, 129 S.Ct. at 2091. The Supreme Court further stated that "Montejo may also seek on remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, e.g., his argument that the waiver was invalid because it was based on misrepresentation by police as to whether he had been appointed a lawyer, cf. *Moran [v. Burbine]*, 475 U.S. [412] at 428, 429, [106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)]. Id., 129 S.Ct. at 2091-92. However, under state law, the defendant does not get a second chance to assert arguments on appeal that he could have asserted to the trial court in a motion to suppress.[19]

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[19] Montejo argues on remand that "to admit the statements now without holding a hearing on this issue, because he relied on *Jackson*, would be to default him for failing to foresee that the law would change, and would require future defense counsel to press claims in every instance based upon haphazard speculation that the law might change." Presumably, Montejo would posit those same arguments in response to our ruling today. However, the jurisprudence Montejo relies on now in support of his claims was equally in force before *Jackson* was overruled and offered him the same protections independently of *Jackson*. Regardless of whether the law of *Jackson* changed, he still had these additional protections that he should have argued if facts existed to support those claims. Further, as explained infra, even though

Regarding the potential *Edwards'* claim, as Montejo was in custody on September 10, his Fifth Amendment rights were implicated regardless of whether the Sixth Amendment had also been violated.[20] As the Supreme Court stated, "the right to have counsel during custodial interrogation . . . [is] guaranteed (once the [Pg 28] adversarial process has begun) by two sources of law" and it is "irrelevant" "that the doctrine established by Miranda and Edwards is designed to protect Fifth Amendment, not Sixth Amendment, rights." Montejo, supra, 129 S.Ct. at 2090. The Supreme Court explained that the protections of

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the case he relied on was overruled, it provided a dubious basis for success given the facts alleged; thus, if he had any alternative arguments, he had to make them for the district judge's consideration in determining admissibility.

[20] Under *Edwards*, once "an accused has invoked his right to have counsel present during custodial interrogation... [he] is not subject to further interrogation by the authorities until counsel has been made available," unless he initiates the contact. 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). The *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990). It does this by presuming his post-assertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *Montejo, supra*, 129 S.Ct. at 2085 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991)).

Miranda/Edwards/Minnick[21] 21 overlap with the protections offered by *Jackson*,[22] and operate before the defendant's arraignment as well as after his arraignment. Id, 129 S.Ct. at 2090. Thus, the claim Montejo now wants to raise under *Edwards* existed in addition to *Jackson* and provided an independent basis to suppress the apology letter; therefore, if Montejo had this claim to make, he was required to assert it in a motion to suppress. La. C.Cr.P. art. 703. Although defendant vigorously pressed a Fifth Amendment claim regarding the earlier videotaped interrogations, the protections of the Fifth Amendment did not cease when Montejo attended the 72-hour hearing a few days later on September 10, yet defendant did not contend at the suppression hearing that, before agreeing to accompany the

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[21] The Court explained that "[u]nder *Miranda's* prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right." *Montejo*, supra, 129 S.Ct. at 2089. "Under *Edwards'* prophylactic protection of *Miranda*, once such a defendant 'has invoked his right to have counsel present,' interrogation must stop." Id., 129 S.Ct. at 2089-90. "And under Minnick's prophylactic protection of the Edwards rule, no subsequent interrogation may take place until counsel is present, 'whether or not the accused has consulted with his attorney.'" *Id.*

[22] The only situations covered by *Jackson* that are not covered by the *Miranda-Edwards* regime are those where a defendant is not in custody. *Montejo, supra*, 129 S.Ct. at 2090.

officers on the evidence seeking expedition, he requested counsel but was worn down through badgering into accompanying the officers.

The need to raise this claim is especially true in light of the fact that Montejo's *Jackson* claim was particularly tenuous under Louisiana law, given that he stood mute at the 72-hour hearing, and cases from this Court and the United States Court of Appeals for the Fifth Circuit had interpreted *Jackson* to mean that in order for Sixth Amendment protections of *Jackson* to apply, there must have been a request for, retention of, or acceptance of counsel at the initial appearance. *State v. Carter*, 94-2859 (La. 11/27/95), 664 So. 2d 367, 383 ("[s]omething more than mere mute ac-quiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel sufficiently to trigger the enhanced protection provided by *Michigan v. Jackson's* prophylactic rule"); *Montoya v. Collins*, 955 F.2d 279 (5 th Cir. 1992) (the rule of Jackson is only invoked when a defendant makes "an actual, positive statement or affirmation of the right to counsel" at the time counsel is appointed), cert denied, 506 U.S. 1036, 113 S. Ct. 820, 121 L. Ed. 2d 692 (1993); cf. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (indictment does not trigger Sixth Amendment protections unless defendant indicates he wants the assistance of counsel). Thus, under controlling state law precedent interpreting *Jackson*, a defendant who does not assert his right to counsel at a court appearance where counsel is

appointed can be subsequently questioned by police after a valid *Miranda* waiver; therefore, Montejo's *Jackson* claim could not have been valid on the grounds he asserted in the motion. Given the precariousness of his *Jackson* claim, he clearly should have, and would have, asserted that he made a clear assertion of his right to counsel but was worn down by badgering, if he also believed this had occurred.

In fact, defendant has previously asserted quite the opposite. In brief to this Court on original hearing, defense counsel conceded that "[b]y Mr. Montejo's own admission his request for counsel [on September 10] was not a clear assertion or invocation of his 'right.'" Indeed, the Supreme Court directed in this case, "[o]ur cases make clear which sorts of statements trigger [*Edwards*] protections, see *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). . ." *Montejo*, supra, 129 S.Ct. at 2091,[23] and, in our view, the

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[23] In remanding this matter, the Supreme Court directed our attention to *Davis*, supra at 459 and Justice Kennedy's concurrence in *Texas v. Cobb*, 532 U.S. 162, 176, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) to determine whether Montejo's statements constituted a clear assertion of the right to counsel. *Montejo, supra*, 129 S.Ct. at 2091. In *Cobb*, Justice Kennedy's concurrence questions the wisdom of Jackson and argues that it should only apply where the suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*. *Cobb*, 532 U.S. at 176 (Kennedy, concurring).

statements Montejo made did not trigger these protections. In *Davis*, the Supreme Court described with speci-ficity the requirements for a clear assertion of the right to counsel:

> Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of attorney." *McNeil v. Wisconsin*, 501 U.S. at 178, 111 S.Ct. at 2209. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. See ibid. ("[T]he likelihood that a suspect would wish counsel to be present is not the test for applicability of *Edwards*"); *Edwards v. Arizona*, *supra*, 451 U.S., at 485, 101 S.Ct., at 1885 (impermissible for authorities "to reinterrogate an accused in custody if he has clearly asserted his right to counsel") (emphasis added).
>
> Rather, the suspect must unambiguously request counsel.

512 U.S. at 459, 114 S.Ct. 2350.[24] In *Davis*, the Supreme Court found that the statement "Maybe I should talk to a lawyer" was not a clear and unambiguous request for counsel. Nor, as de-fense counsel has previously recognized, did Montejo's alleged statement to police that "Well, and I don't, I don't, I don't really want to go with you ... I got a lawyer appointed to me ... . Yeah, I think I got a lawyer appointed to me" constitute an "unambiguous request for counsel." It is more properly

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[24] The Court in *Davis* explained its reasons for requiring a clear and unambiguous request for an attorney as follows:

> The *Edwards* rule-questioning must cease if the suspect asks for a lawyer provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

512 U.S. at 461, 114 S.Ct. 2350.

characterized as a statement that the defendant might want counsel, or an "ambiguous or equivocal" request for counsel, or an indecisive request for counsel, each of which the *Davis* Court stated would be insufficient to trigger *Edwards'* protections against further questioning. Thus, even if his testimony could be considered in determining the letter's admissibility and was accepted as true, this request did not meet the criteria described in *Davis*.

As to the waiver issue, the Supreme Court instructed: "Montejo may also seek on remand to press any claim he might have that his waiver was invalid because it was based on misrepresenta-tions by police as to whether he had been appointed a lawyer, c.f, *Moran*, 475 U.S. at 428, 429." *Montejo*, supra, 129 S.Ct. 2092. The Court added that "[t]hese matters have heightened importance in light of our opinion today." *Id*, However, although more important now, the waiver argument is based on jurisprudence that was equally in force at the time of the motion. Further, as Montejo's *Jackson* claim was questionable under the grounds he asserted in the motion, i.e., mere appointment of counsel invokes the protections of *Jackson*, contra, *State v. Carter*, supra, an invalid waiver would have been a critical argument. With or without *Jackson*, if in fact the officers misled him or kept him from counsel, Montejo had an independent argument under

Moran[25] and numerous other Supreme Court cases that his Fifth or Sixth Amendment rights were violated by that police action.[26] In fact, he may have

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[25] In *Moran*, the Supreme Court found that police are not required "to supply a suspect with a flow of information to help him calibrate his self-interest, in deciding whether to speak or stand by his rights," and therefore interrogators withholding of the information that his attorney was attempting to reach him was "only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Although the Sixth Amendment claim in *Moran* was resolved on the basis that "the events that led to the inculpatory statements preceded the formal initiation of adversary judicial proceedings," the Court in its Fifth Amendment analysis declined to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him." See *Moran, supra*, 475 U.S. at 424, 432, 106 S.Ct. at 1143, 1146.

[26] According to *Patterson*, "because the Sixth Amendment's protection of the attorney-client relationship 'the right to rely on counsel as a 'medium' between [the accused] and the State" extends beyond *Miranda's* protection of the Fifth Amendment right to counsel, see *Maine v. Moulton*, 474 U.S., at 176, 106 S.Ct., at 487, there will be cases where a waiver which would be valid under Miranda will not suffice for Sixth Amendment purposes." *Patterson*, supra, 487 U.S., at 297 n.9, 108 S.Ct. at 2397. While after *Montejo* it is unclear whether a waiver valid for Fifth Amendment purposes will also be valid under the Sixth Amendment, existing Supreme Court precedent provided an independent ground for any constitutional argument that his waiver was invalid, especially in the Sixth Amendment context; therefore, he was required to assert it in a motion to suppress.

had an even stronger case under Louisiana law, because conduct approved by federal jurisprudence might not be permitted under state law. See *State v. Reed*, 390 So. 2d 1314,1315 (La. 1980) ("when the government interferes with the Sixth Amendment right to counsel by giving erroneous information to a defendant's attorney, it cannot take advantage of any time gained by that ploy to obtain incriminating statements"); *State v. Trevathan*, 414 So. 2d 316, 318-19 (La. 1982) (violation of Sixth Amendment for police to interrogate defendant after his attorney instructed police not to interrogate him without counsel present or take him to the scene where the victim's body was found); *State v. Hattaway*, 621 So. 2d 796, 798 (La.' 1993) (police violated defendant's Sixth Amendment rights when they unlawfully removed him from the trial venue without notice to his court appointed counsel and transported him to another parish, confining him there without means of contacting his attorney, friends, family, or potential defense witnesses), overruled on other grounds, *State v. Carter, supra.*

Montejo asserted no arguments to the trial court on a motion to suppress that his subsequent waiver was unknowing or involuntary because of misrepresentations made by police, in spite of this strong, existing case law in support of that claim. The waiver issue was highly relevant, especially in light of the fact that his *Jackson* claim was so tenuous. In fact, the waiver issue was clearly contemplated by defendant before *Jackson* was overruled, as he argued on original hearing to this

Court that his waiver was unknowing, albeit for slightly different reasons.[27] If Montejo had any claims that he did not make a knowing, intelligent, and valid waiver of the right to counsel when he was approached by police on September 10 because he was misled and lied to by police, those claims would have been just as valid under the law as it stood then as they would be now, and he clearly would have, and should have, asserted those claims had facts existed to support them claims.

Harmless Error

The erroneous admission of a confession is a trial error subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct.

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[27] In conjunction with his *Jackson* claim, defendant argued on original hearing to this Court in his reply brief that his waiver was not "knowing" because neither he nor the police knew he had been appointed an attorney. On original hearing, we held that the giving of Miranda warnings and the fact that he had been told at the 72-hour hearing that counsel was being appointed to him was sufficient to apprise him of his right to counsel. 974 So. 2d at 1262. In footnotes, we noted that "[e]ven if defendant's assertion is true and the police did tell defendant he did not have a lawyer, this does not rise to the level of the facts presented in *Moran v. Burbine*" Id., at 1262, n.69. We also noted that Montejo did not claim his waiver was not voluntary. Id., at 1262, n.70. Thus, although the Supreme Court directed that Montejo can argue "the waiver was invalid because it was based on misrepresentation by police as to whether he had been appointed a lawyer, cf. Moran," in reality he attempted to do so before *Jackson* was ever overruled.

1246, 113 L. Ed. 2d 302 (1991); *State v. Koon,* 96-1208 (La. 5/20/97), 704 So. 2d 756, 763-64; *State v. Tart,* 93-0772 (La. 2/9/96), 672 So. 2d 116, 128-29. An error is harmless beyond a reasonable doubt if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also *State v. Koon, supra; State v. Tart, supra.*

The following evidence, as described in our opinion on original hearing, was presented to the jury. See *State v. Montejo, supra,* 974 So. 2d at 1241-1249. According to the State, the crime was planned by Jerry Moore[28] and perpetrated by Montejo with the assistance of Montejo's 19-year-old step-brother, Eric Gai.[29] At trial, witnesses described the victim as a person who followed a well-known and predictable routine, and who was killed on the day he transported the pay roll. The victim's widow described her husband's habits for the jury,

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[28] Jerry Moore was tried separately, convicted of second degree murder, and sentenced to life imprisonment. His conviction and sentence were affirmed on appeal and this Court denied writs. *State v. Moore,* 06-1979 (La. App. 1 Cir. 3/28/07), 953 So. 2d 209 (unpublished), writ denied, 07-0851 (La. 11/9/07), 967 So. 2d 500; see also *State ex rel. Moore v. State,* 09-0177 (La. 10/16/09), 19 So. 3d 475.

[29] Eric Gai pled guilty to manslaughter and received a 25-year sentence.

including how he transported money, deposits, and checks in the trunk of his vehicle on Thursdays, which was the day he did payroll, and how he could usually be found at home between four to six p.m. Another employee, Birdie Sue Morrow, confirmed that the victim paid his employees on Thursdays. Typically on Thursdays, the Ferrari family would meet at a local restaurant sometime after 6:00 p.m. for a family dinner.

The victim's adult son, Lewis Ferrari III, testified that Moore was familiar with his father's routines. Several witnesses described Moore's recent association with the defendant and his long-term but rocky relationship with the victim. The victim's widow testified that Moore had performed mechanical work for the family dry cleaning business for about 10 years but that he became unreliable. Lewis F. Ferrari III confirmed that Moore was capable of good electrical work but that he had become very unreliable, and he said that he objected to his father continuing to employ Moore. Both of these witnesses testified that Moore recently lost his driver's license and he had hired Montejo, whom he met while hitchhiking, to transport him. The victim's son described Montejo's car as a blue van with a distinctive chrome cattle guard in the front.

Morrow testified that she saw Moore and the victim argue on two occasions: once about one month before and again on the day of the murder. On both occasions, she heard the victim tell Moore that he

was not afraid of him. She said that Moore left after the most recent argument by entering the passenger side of the blue van that routinely transported him. Hugh Dillard, who owns and operates a poboy shop next to the victim's dry cleaning business, also watched Moore and the victim argue loudly outside his shop on the morning of September 5, 2002.

The victim's widow testified that they lived in a quiet neighborhood on Rue Lamothe in Slidell. Several neighbors noticed Montejo's blue van, with its distinctive chrome cattle bar, in the neighborhood the time of the murder. Stacy Stubbenville, who lived on Rue Lamothe, was driving home at about 4:15 p.m. on the day the victim was murdered when she noticed an unusual blue van with a chrome cattle bar on the front. The van had a driver and a passenger. Larry Landry, another neighbor, also noticed the blue van in the neighborhood at some time between three to five p.m. on the day of the murder. Jo Ann Diaro lived near the Ferraris. On the day of the murder, she arrived home at 5:00 p.m. and left again at 5:30 p.m., when she noticed two vehicles: a blue van (driven by a young white male with brown hair) driving very quickly down the street and the victim's white Lincoln (whose driver she could not see) backing out of the Ferraris' driveway. The two vehicles almost collided when the Lincoln cut off the van and they stopped briefly together before exiting the neighborhood. Finally, Janice Dow, who also lived near the Ferraris, saw the blue van driving very quickly through the neighborhood twice on the day of the murder: once at

4:30 p.m. and again at about 5:30 p.m. with the Ferraris' white Lincoln behind it.

The State presented physical evidence, which included the undisputable presence of Montejo's DNA under the victim's fingernails. Dr. Dudhir Sinha, president and laboratory director of ReliaGene, testified as an expert in molecular biology and DNA analysis that he tested scrapings from beneath the victim's fingernails and a reference sample from the defendant. A scraping from the victim's right hand contained only the victim's DNA; a scraping from the victim's left hand contained a mixture of the victim and defendant's DNA. Dr. Sinha also concluded that the victim intentionally scratched defendant because sample characteristics ruled out DNA transfer by coincidental contact.

The victim's body was examined at the crime scene as well as later autopsied by Dr. Mike Difatta, chief deputy coroner for St. Tammany Parish. Dr. Difatta testified as an expert in forensic pathology that the victim sustained two gunshot wounds: one superficial and one fatal. According to Dr. Difatta, the victim was shot once in close contact in his right side and again in his right eye from a distance of at least three feet. The victim would have died within seconds of the gunshot to his head, which the evidence suggested was fired between 4-5 p.m. Dr. Difatta saw no evidence to suggest that the victim was struck in the head with a blunt object.

Sergeant Carl Fullilove testified as an expert ballistics and firearms examiner that he examined a bullet and bullet fragments found at the crime scene but noted that the murder weapon was not found in this case. He said that a single intact bullet was extracted from the wall at the crime scene that was similar to the victim's own revolver ammunition, but without the murder weapon it was only possible to infer that the victim was probably killed by a shot from a revolver.

James Folse of the St. Tammany Parish Crime Lab collected forensic evidence at the victim's home. He extracted an intact bullet from the dining room wall and recovered bullet fragments from the living room near and underneath the sofa. He obtained only one useful fingerprint from the victim's residence, which was left by a person who was never identified. Susan Downey of the St. Tammany Parish Crime Lab documented the crime scene at the victim's home. She observed an intact bullet in a door casing that appeared to have been shot through the victim and bullet fragments in the concrete slab beneath the sofa. She testified that the victim's sofa had a bullet hole and the characteristic indentation of a revolver. She described the blood pooling, characterized the blood spatter as "high velocity," and she saw no signs of struggle but noticed that the bedroom was in disarray.

Folse also assisted in processing Montejo's van and the victim's Lincoln as well as evidence seized from Gai. He photographed the Lincoln, which was

found in an isolated location and later processed at the crime lab by Sergeant Fullilove. The area near this vehicle was searched but no weapon was found. Sergeant Fullilove testified that he found one identifiable partial palm print on the victim's Lincoln, which belonged to the victim, and that the accelerator pedal of this vehicle tested positive for blood. Inside Montejo's van, Folse found receipts for stereo equipment dated September 6, 2002, $ 322 in cash, and gloves. No blood was found inside the van or on the defendant's clothing. Detectives delivered a seat cushion to the crime lab that was taken from Gai, which Folse documented, that concealed $ 832. Folse identified photographs of the victim's car, the area in which it was found, and Montejo's van, which were admitted without objection, and some of which were projected during his testimony.

After he was taken into custody, Montejo was interviewed by police from about 4:30 p.m. until about 11 p.m. on September 6, 2002, and again between approximately 3:00 and 4:00 a.m. on September 7, 2002. The centerpiece of the state's case was approximately four hours of this videotaped police interrogation during which Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim who had unexpectedly returned home and interrupted Montejo's burglary.

At the beginning of the interview, Montejo related his first version of the crime, in which he claimed that his only involvement was in driving

Moore to the victim's home and leaving him there without knowing that Moore was going to rob and kill the victim. Confronted with the potential that his DNA might be found inside the home, Montejo related his second version of the crime. He said that the victim was not home when he arrived at about 5 p.m. with Moore, who told him that they could wait inside. After about 10 minutes, Moore started ransacking the residence, so Montejo left. He became disoriented and was briefly lost in the neighborhood. After he regained his bearings, he saw Moore drive away in the victim's car. Montejo attempted to answer the detectives' follow-up questions, but abandoned this story for a third version, after detectives suggested that Moore would blame Montejo and confronted him with the possibility that the forensic evidence would prove that the victim scratched his neck or that he was present when the murder weapon was fired. In the third version, Montejo did not leave when Moore (who was wearing gloves) ransacked the home. Instead, he and Moore hid when the victim arrived. Moore struck the victim over the back of the head with the gun and Montejo tried to run. The victim turned and flailed wildly, scratching Montejo, and Moore shot the victim, who remained standing. As Montejo fled, he heard a second shot. Montejo became briefly lost in the neighborhood and saw Moore drive away in the victim's car. In response to demands for corroborating physical evidence, such as the location of the murder weapon or any stolen property, and again confronted with forensic evidence, Montejo

invoked his right to counsel but quickly retracted his request.

After Montejo invoked and revoked his right to counsel, defendant was again read his Miranda rights and signed written waivers of those rights. Montejo then retracted his claims that Moore killed the victim, and told a fourth version of the crime as a botched burglary. He said that Moore persuaded him to burglarize the victim's home, which he believed would be unoccupied, unlocked, and full of money, and that he agreed to do so because his rent was due. However, he found the victim's gun inside the home and, when the victim came home and surprised him, Montejo hit him in the head with the gun, warned him to stay back, fired a warning shot, and when that failed, shot and killed the victim, before firing the weapon into the couch to un-cock it, and throwing the gun in the lake. After detectives confronted him with the fact that two vehicles left the crime scene together, Montejo retracted this story and told a fifth version of the crime, in which he blamed a person he knew only as "D.P.," an African-American male from the Fischer projects, whom he claimed would be impossible to locate. Montejo said he was introduced to D.P. by Moore, who wanted defendant and D.P. to rob the victim. Montejo agreed because his rent was overdue so he met D.P. at the Rally's and they went to the victim's home. After detectives confronted Montejo with the implausibility of this story, they terminated the interview and the video stops. The defendant was arrested and transported to jail.

Montejo was interviewed for about four hours later in the early morning on September 7, 2002, and that interview was also videotaped and shown to the jury. During this interview, Montejo told his sixth version of the crime. He said that Gai, who did not know that Montejo planned to burglarize the home because his rent was overdue, dropped him off at the victim's house at about 5:30 p.m. and was instructed to return later. Moore had told Montejo that the house was unlocked, contained a lot of money, and would be unoccupied because the family would be at dinner. Inside the home, Montejo found a gun, which he picked up to use to scare anyone away who might come home. When the victim returned 10 minutes later, Montejo hit him over the head with the gun, which failed to knock him out, and then fired a warning shot that he intended to miss the victim. However, the victim continued to struggle with him so Montejo shot him. Montejo fled in the victim's vehicle, and found Gai and told him to follow him. Montejo threw the gun out of the window into the lake from the Highway 11 bridge, burned the victim's money bag, threw his gloves out of the window on the highway, gave $ 800 to Gai, gave some money to Moore, and used his share of the money to pay bills. These videos were played for the jury at trial.

The defendant also testified at trial. He testified that he falsely confessed during the videotaped interrogation because he was exhausted and trying to satisfy the detectives. He then told a seventh version of the crime, which was an

elaborated variation of the fifth in which D.P. was first introduced. Defendant testified that on Friday of the week before the murder, when he went to pick up money from the victim on behalf of Moore, the victim introduced him to D.P. and suggested they all meet next week to discuss Montejo working as D.P.'s, rather than Moore's, driver. Montejo described D.P. as an African-American male, about 5'8"' tall, with his initials tattooed in an Old English script on his forearms, who lived in the Fischer Projects. The next week, on the day before the murder, the victim told Montejo to come to his house the next day before 6 p.m. The next day, Gai dropped him off at the victim's house, and D.P. answered the door. Inside the residence, D.P. displayed a gun, grabbed Montejo, and took his wallet, from which D.P. retrieved Montejo's license, which he scrutinized. D.P. commented that he now knew where Montejo lived, asked him if he had a big mouth, forced him to the floor, placed the gun against his head, threatened to kill or have killed Montejo or a member of Montejo's family, and fired the gun into the couch to intimidate him. The victim then arrived and D.P. instructed Montejo to hide. When the victim entered the kitchen, D.P. hit him, which caused the victim to fall onto Montejo. The victim turned around and swung at D.P., who fired at him, and the victim then threw his arms up and backed up. D.P. then threatened them both and demanded the victim's "big stash." D.P. took Montejo's wallet again, placed some of the victim's money in it before returning the wallet to Montejo, instructed the victim to give Montejo his car keys,

threatened Montejo's family again, told him to leave, and held the gun to the victim's face. As Montejo left, he heard D.P. threaten the victim and the victim assure D.P. that he would cooperate. Montejo closed the door, heard a gunshot, and fled in the victim's car but became temporarily lost. Montejo then found Gai but almost collided with him trying to get his attention. He instructed Gai to follow him and they abandoned the victim's car on a dirt road. Montejo then told Gai what had happened and gave him the money that D.P. put in his wallet. He testified he did not contact the police because he believed D.P.'s threats.

In light of the above evidence presented at trial, we find that regardless of whether the letter was admitted in violation of the Fifth or Sixth Amendment, the introduction of the letter was harmless. As stated above, an error is harmless beyond a reasonable doubt if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error. *Chapman, supra; State v. Koon, supra; State v. Tart, supra.* When that standard is applied to the admission of an erroneously admitted confession where other confessions or statements were properly admitted, courts have examined the extent to which the improperly admitted confessions are cumulative or less detailed, the amount of inculpatory corroborating evidence presented at trial, whether the improperly admitted evidence is necessary to corroborate any aspect of the crime, and the existence of any connection between the properly

admitted and improperly admitted statements. *See, e.g., Zappulla v. New York*, 391 F. 3d 462, 473 (2nd Cir. 2004) (finding that the confession resolved the apparent conflict between the testimony of the two witnesses regarding motive and was therefore not harmless); *Cooper v. Taylor*, 103 F.3d 366, 370-71 (4th Cir. 1996) (finding that "when viewing the record as a whole, we simply recognize the obvious power of the two other confessions, together with the other overwhelming evidence of guilt, and conclude that [the admission of the third confession was harmless]"; *Commonwealth v. Markman*, 591 Pa. 249, 916 A.2d 586, 603 (Pa. 2007) (noting that the "confession painted Appellant as the individual who directed all of the crucial events to accomplish [the crimes, and therefore,] the prejudicial effect of [the] statement was not *de minimis*); *McCoy v. United States*, 890 A.2d 204, 208-09 (D.C. 2006) (noting that the improperly admitted confession was only "partially cumulative of other testimony [and] presented the jury with two significant pieces of evidence [that were] not found anywhere else in the government's case"); *State v. Rezk*, 150 N.H. 483, 840 A.2d 758 (N.H. 2004) (finding that the "confessions were merely cumulative of and inconsequential in relation to [the other evidence presented]"; *State v. Johnson*, 2004 NMSC 29, 136 N.M. 348, 98 P.3d 998, 1009 (N.M. 2004) (finding that "we must carefully evaluate the degree to which the inadmissible evidence might have operated to corroborate other similar evidence of guilt"); *Hill v. State*, 2009 Tex. App. LEXIS 5523, 2009 WL 2145833 *7 (Tex. App. 2009) (examining "the

confession's content and any collateral implications stemming from the confession's admission" and noting that "[t]he State placed little emphasis on the erroneously admitted confession"); *Davies v. State*, 730 N.E.2d 726, 735 (Ind. App. 2000) (noting that the improperly admitted statement was "very general" in comparison to the "much more detailed" properly admitted confession).

As described above, in the properly admitted videotaped interrogation, Montejo told several increasingly incriminating versions of the crime. These included two different variations of the botched burglary story, both very detailed. That same botched burglary story was described in the apology letter, but in more general terms and very briefly. The apology letter contains no assertions (other than the expressions of remorse) that do not also appear on the videotape. The apology letter is not the sole proof of any element of the crime nor does it provide essential corroboration. The apology letter is unconnected to the properly admitted confessions made in the videotaped interrogation, which took place several days before the letter was written. In addition, while it was introduced in the State's case in chief, references to the letter by the State were minimal and more akin to impeachment, whereas the defense referred to the letter at length in an attempt to diminish the credibility of the police by alleging that the police forced him to write the letter and told him what to say. Finally, the apology letter is inconsequential in comparison to the properly admitted videotaped confession, Montejo's

own incredible trial testimony, the eyewitnesses who saw Montejo's car flee the vicinity of the crime, evidence of the proceeds of the crime found on Montejo and Gai, the testimony concerning motive, and the presence of Montejo's DNA under the victim's fingernails which an expert testified was the result of the victim intentionally scratching the defendant. Under these circumstances, we find that any error in admitting the apology letter was harmless beyond a reasonable doubt as it was unimportant in relation to the whole and the verdict rendered and sentence imposed was surely unattributable to the error.

CONCLUSION

A new basis for an objection cannot be raised for the first time on appeal. La. C.Cr.P. art. 841. A defendant adversely affected by his confession or other statement can file a motion to suppress the statement on any constitutional grounds and must file the motion in accordance with the date set by the trial judge for such pre-trial motions. In order for the trial court to hold a hearing, the defendant must allege facts that would require the granting of relief. The requirement of a separate motion hearing ensures that all disputes over police conduct unrelated to a defendant's guilt or innocence are eliminated from the jury trial and avoids unwarranted delay and jury confusion. At the hearing, the State bears the burden of proving the

admissibility of a confession, and must specifically rebut any allegations the defendant makes regarding police misconduct. A defendant must assert all grounds for suppressing the evidence of which either defendant or defense counsel were aware. A trial court's ruling on a motion to suppress is binding at trial and the defendant is prohibited from objecting to the evidence's admissibility on a ground that could have been, but was not, asserted in the motion to suppress. In reviewing a trial court's ruling on a motion to suppress, although a reviewing court may look to trial testimony in addition to testimony at the motion hearing in considering whether the district court's ruling was correct, a reviewing court will not look to trial court testimony in support of a ground for excluding the evidence that was not asserted in a motion to suppress.

In this case, defendant's testimony at trial that he asserted his right to counsel when police approached him on September 10, 2002, and that his subsequent waiver was invalid because the police misled him into thinking he did not have an attorney, comes too late for consideration as to the admissibility of that evidence because those grounds for suppressing the evidence were available, but were not asserted by defendant in a motion to suppress.

Finally, even assuming that the letter was improperly admitted, its admission at trial was harmless. The letter was cumulative of other properly admitted evidence, contained no assertions

not contained in the much more detailed videotaped confessions, did not provide the sole proof of any element of the crime, and was inconsequential in comparison to the properly admitted videotaped confession, Montejo's own incredible trial testimony, the eyewitnesses who saw Montejo's car flee the vicinity of the crime, and the presence of Montejo's DNA under the victim's fingernails.

DECREE

For the reasons assigned herein, and having once affirmed the defendant's conviction and death sentence, this Court, after remand from the United States Supreme Court, again affirms the defendant's conviction and death sentence. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been certiorari, fails to petition the United States Supreme Court timely, under their prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this Court under La.C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any State post-conviction proceedings, if appropriate,

pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed in the state courts.

AFFIRMED.

APPENDIX B

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

JESSE JAY MONTEJO

2006-KA-1807 (La. 06/25/2010); __ So. 2d __.

Rehearing Denied.

124 (1)

No. 10-416

In the Supreme Court of the United States

JESSE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Supreme Court

BRIEF IN OPPOSITION

KATHRYN LANDRY
Counsel of Record
WALTER P. REED, DISTRICT ATTORNEY
HOUSTON C. GASCON, III
SCOTT C. GARDNER
POST OFFICE BOX 82659
BATON ROUGE, LA 70884
TELEPHONE: (225) 766-0023
Kathilandry@aol.com

Counsel for Respondent, State of Louisiana

October 27, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

In light of the remand order of this Court, which provided Montejo with the "opportunity" to contend his letter of apology should have been suppressed under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981) but coupled with the caution that Montejo's testimony may have come too late to affect the propriety of the admission of the evidence under Louisiana procedural law, the questions presented to this Court by Montejo are as follows:

1. Whether Montejo's September 10th waiver was invalid because it was based on alleged misrepresentations by police that he had not been appointed a lawyer, even though this issue was never presented to the state court as a basis for suppression and there are disputed facts regarding any alleged misrepresentations, as a result of his failure to raise this issue in the trial court.

2. Whether Montejo's September 10th statement should have been suppressed under *Edwards, supra*, even though this issue was never presented to the state court as a basis for suppression.

3. Whether Montejo can raise any issues with respect to his September 6th videotaped statements and the conduct of the police in relation thereto, when those statements were never at issue when this case was previously before this Court, and therefore, were not part of the remand order.

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STATEMENT OF THE CASE

The Murder and Evidence

On September 5, 2002, Lou Ferrari was murdered in his home in St. Tammany Parish, and was found in the kitchen by his wife, Pat Ferrari. Lou Ferrari had suffered two gunshot wounds, one to the right chest area and one to the right eye. The wound to the chest was determined to be a contact wound, meaning the gun was in contact with Mr. Ferrari's body when it was fired. However, the gunshot wound to the chest exited Mr. Ferrari's body and was a non-fatal injury. The gunshot wound to the right eye resulted in a complete destruction of the right eye. The bullet traveled through the eye, then through the right base of the brain, and exited the back of Mr. Ferrari's skull. This gunshot wound was fatal within a matter of seconds.

The Ferrari family operated a dry-cleaning business for approximately 26 years, operating ten stores in the area at the time of Mr. Ferrari's murder. Lou Ferrari's wife, Pat, and son, Louis, worked with him in the business. Montejo was an acquaintance/friend of Jerry Moore[1], who had

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[1] As a result of his role in the murder of Lou Ferrari, Jerry Moore was charged with and convicted by a jury of second degree murder under Louisiana law. Jerry Moore was not present at the time of the murder and did not discharge the weapon. He later identified Montejo as the shooter. Moore was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The conviction and sentence of Moore were affirmed by the Louisiana First Circuit Court of Appeal, Docket no. 2006

performed mechanical work on the equipment at the Ferrari stores for a number of years.

Montejo drove a blue van, which was his mode of transportation in driving Moore. The blue van was apparently quite distinctive, with a "cattle guard" on the front. Neighbors of the Ferraris saw Montejo's blue van in the neighborhood the day before the murder and again at the approximate time of the murder. In fact, the blue van left the scene at a high rate of speed, along with Mr. Ferrari's white Lincoln vehicle, stolen during the course of the robbery.[2] In addition to the foregoing, the investigating officers and crime scene personnel collected fingernail scrapings from Lou Ferrari. Photographs were taken of defendant, which showed abrasions on his neck. Dr. Sudhir Sinha, an expert in molecular biology and DNA, performed the DNA testing on these scrapings. Dr. Sinha testified that the DNA in the left fingernail scrapings resulted from an intentional scratch and was not the result of minor contact, such as shaking hands. According to Dr. Sinha, there was a high degree of certainty, the chance of a random match being 1 in 163 billion, that the DNA found in the fingernail scrapings from the victim matched defendant.

Once Mr. Ferrari entered his home that afternoon, he had no means of escaping Montejo, intent on getting the money he wanted. The testimony of the Chief

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KA 1979, and the Louisiana Supreme Court denied his writ application.

[2] A third person, Eric Gai, was identified as the other driver leaving the scene. Mr. Gai pled guilty to manslaughter in connection with his role in this murder.

Deputy Coroner, Dr. Michael Difatta, established that the gunshot wound to Mr. Ferrari's eye would have resulted in almost instantaneous death, dropping the victim "right there". The crime scene photographs showed the position of Mr. Ferrari, demonstrating that the victim was cornered by Montejo when he was shot and killed.

Defendant testified at the trial and admitted he was at the Ferrari house when Lou Ferrari was murdered, although he claimed that he was there by virtue of an invitation from Mr. Ferrari. Montejo claimed at trial that a black male who he could only identify as D.P. was the murderer. However, Montejo had previously confessed in a videotaped interview with police. As the Louisiana Supreme Court noted in its original decision herein, the story he gave at trial was the seventh version of the crime given by Montejo, which was "an elaborated variation" of the fifth version. *State v. Montejo*, 974 So.2d 1238, 1248 (La. 2008). Montejo had an extensive criminal history from Florida, with numerous convictions for crimes such as theft, burglary and armed robbery. During the interrogation, he appeared to be a savvy ex-con, who was trying to read the police, attempting to determine how much they knew as he spoke with them. He gave the police bits and pieces of information, which gradually increased until he confessed to shooting Mr. Ferrari, although, even then, he tried to minimize his role and intent in the crime. As the Louisiana Supreme Court noted, the jury watched approximately four hours of the videotaped police interrogation of Montejo, "during which Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim, who had

unexpectedly returned home and interrupted Montejo's burglary." *Montejo*, *supra* at 1244.

While Montejo appears to re-urge some of the issues surrounding his videotaped confession, the admission of the videotaped confession was not at issue in the original proceeding in this Court and was not included in the remand order. The only evidence at issue is the apology letter written by Montejo on September 10th. The Louisiana Supreme Court previously conducted an exhaustive review of those tapes and the applicable law, finding when Montejo initially invoked his *Miranda* counsel right "the interview was terminated" and both detectives "scrupulously honored" his request. *Montejo*, *supra* at 1254-55. That Court found further that Montejo validly retracted his initial request for counsel, *id.* at 1256, and later "validly waived his *Miranda* rights before the resumption of the interview." *Id.* at 1258.

The Apology Letter, Motion to Suppress and Proceedings

Defendant filed a pretrial Motion to Suppress Inculpatory Statements, which alleged as follows:

> Defendant moves to suppress for use as evidence all oral or written inculpatory statements obtained from defendant by all law enforcement officers or other agents of the State in the above captioned and numbered cause.
>
> All of said confessions and other inculpatory statements are inadmissible because they were not made by defendant to said law enforcement officers or anyone else freely and voluntarily,

> but were made under the influence of fear, duress, intimidation, menaces, threats, inducements, and promises, and/or without mover having been advised of his Constitutional rights to remain silent, right to counsel, etc.

At the suppression hearing, defense counsel argued that the written apology letter should be suppressed because counsel had been appointed for defendant earlier that day, and since defendant was appointed counsel, the police were prohibited from speaking with him. Defendant did not assert to the trial court that he told the officers he had a lawyer prior to the excursion at issue or that the officers misrepresented to him the fact that he had counsel appointed. In fact, even after defendant's testimony at the end of the trial, the motion to suppress was never re-urged on the basis now before this Court.

With respect to the letter which is at issue in this case, Detective Jerry Hall testified at the suppression hearing that on the morning of September 10, 2002[3], this follow-up was an effort to locate the gun that had been used in the crime and the money bag taken from Mr. Ferrari. The police already had Montejo's videotaped confession. In fact, Montejo had provided the police, during that confession, with an approximate area where he had thrown the gun into Lake Ponchartrain, the largest lake in Louisiana, consisting of approximately 600 square miles. Montejo had told

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[3] Originally, Detective Hall referred to this contact as occurring on September 9, 2002, but later corrected this reference to September 10, 2002. The original reference to September 9 was simply an error.

the officers in his confession that he just went to the home for a burglary, not murder, and that the gun he used belonged to Mr. Ferrari. Apparently, in his attempt to further exculpate himself, he told the officers he wanted to help them find the gun to prove he was telling the truth.

The police had divers in the lake, but had been unable to locate the weapon. They were working with a large grid, and Lake Ponchartrain can be a treacherous and dangerous body of water. Detective Hall approached Montejo, because Montejo had previously offered to help locate the gun, again read Montejo his rights, and asked Montejo if he would accompany them to the bridge and assist in further pinpointing the area where he disposed of the gun, to which Montejo consented, without issue.

The minute entries from this proceeding reflect that a seventy-two (72) hour hearing, pursuant to Louisiana law, was held earlier that day, on the morning of September 10, 2002. La. C.Cr.P. art. 230.1 provides that the sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel, and the judge may also determine or review a prior determination of the amount of bail. The minute entry from that seventy-two hour hearing provides that the defendant was present, and further provides that no bond was set, the defendant, being charged with first degree murder, and the "court ordered the Office of Indigent Defender be appointed to represent the defendant".

Although defendant has alleged, citing his own testimony at trial, that he told Detective Hall that he had a lawyer appointed to him that morning, defendant's testimony directly contradicts the testimony of the officers and was the first time he had ever made such a claim. Detective Jerry Hall testified that he asked Montejo that morning if he had been contacted by an attorney, to which Montejo responded that he had not. Montejo not only did not tell the officers that counsel had been appointed, but he unequivocally denied having a lawyer when directly asked by Detective Hall. In fact, Montejo told the detectives he just wanted to clear this up and never requested a lawyer at that time. Montejo was again provided with his *Miranda* rights and again waived such rights before accompanying the detectives to the lake. While in the back of the police vehicle on the way back to the jail, Montejo requested a pad and pen from the detectives and told them he wanted to write something. He wrote a letter to the widow of the victim, expressing remorse for the shooting of her husband, which was consistent with the videotaped statement in which he claimed that he found the gun while in the home and tried to use it to scare Mr. Ferrari. As the Louisiana Supreme Court found, "there is no dispute that defendant was given his *Miranda* warnings and that he signed a waiver of these rights prior to the September 10 excursion to look for the murder weapon, during which time he wrote the apology letter to Mrs. Ferrari." *Montejo*, *supra* at 1261. In the letter, Montejo attempts to excuse his actions, in yet another exculpatory attempt.

As stated above, defendant's sole argument for exclusion of the letter to the trial court was based on the fact that counsel had been appointed to represent

him on the morning of September 10th, and using the rationale of *Michigan v. Jackson*, 475 U.S. 625 (1986), the police were prohibited from approaching him thereafter. This Court overruled *Michigan v. Jackson*, holding that "Montejo's solution is untenable as a theoretical and doctrinal matter" and that Montejo's interpretation of *Michigan v. Jackson* was "off the mark". *Montejo v. Louisiana*, 556 U.S. –, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). This Court remanded this case in order to allow Montejo the opportunity to contend that his letter of apology should still have been suppressed under *Edwards v. Arizona*, 451 U.S. 477 (1981). However, the Court specifically noted the potential procedural bar to such a review, stating that since "Montejo's testimony came not at the suppression hearing, but rather only at trial" "we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence". *Montejo*, *supra* at 2092. This issue was left to the Louisiana Supreme Court upon remand, and for the reasons that follow, the State submits the Louisiana Supreme Court correctly held that Montejo's claims herein are procedurally barred under state law, but further held the claims fail on the merits, or in the alternative, the admission of the letter constituted harmless error.

ARGUMENT

A. *This Court recognized that since Montejo's testimony came not at the suppression hearing, but only at trial, under state procedural law, it may have come "too late" to affect the propriety of the admission of the evidence*

Montejo repeatedly argues that the Louisiana Supreme Court failed to address the claims that this Court "instructed" it to address, and that it "ignored" the remand order of this Court. (Pet., p. i, 19, n. 10). This Court provided Montejo with the "opportunity" to contend his letter of apology should have been suppressed under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). However, Montejo never acknowledges or addresses the basis of the ruling by the Louisiana Supreme Court, which was recognized by this Court in its remand order as follows:

> . . . Montejo's testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence. These matters are best left for resolution on remand. *Montejo v. Louisiana*, 556 U.S. —, 129 S.Ct. 2079, 2092 (2009).

The Louisiana Supreme Court determined that, under its state procedural law, defendant's testimony at trial came too late for consideration as to the admissibility of the letter because those grounds for suppressing the evidence were available at the time, but were not asserted by defendant as a basis for

suppression of the evidence. *Montejo, supra,* App. A at 73A.

B. Montejo never raised an Edwards argument in support of suppression of the letter prior to appeal

Montejo filed a "brief boilerplate motion to suppress all inculpatory statements" with the state district court. *Montejo, supra*, App A at 11A. That motion alleged as follows:

> Defendant moves to suppress for use as evidence all oral or written inculpatory statements obtained from defendant by all law enforcement officers or other agents of the State in the above captioned and numbered cause.
>
> All of said confessions and other inculpatory statements are inadmissible because they were not made by defendant to said law enforcement officers or anyone else freely and voluntarily, but were made under the influence of fear, duress, intimidation, menaces, threats, inducements, and promises, and/or without mover having been advised of his Constitutional rights to remain silent, right to counsel, etc.

At the suppression hearing, defense counsel argued that the written apology letter should be suppressed because counsel had been appointed for defendant earlier that day, and since defendant was appointed counsel, the police were prohibited from speaking with him. *Defendant never argued, at any time, to the trial court that he told the officers he had a lawyer prior to the excursion at issue or that the officers*

misrepresented to him the fact that he had counsel appointed. In fact, even after defendant's testimony at the end of the trial, the motion to suppress was never re-urged on that basis. Defendant's sole argument for exclusion of the letter was the applicability of *Michigan v. Jackson*, 475 U.S. 625 (1986).

The Louisiana Supreme Court, following remand from this Court, found that Montejo "did not present any evidence, or argument, at the motion to suppress that he asserted his right to counsel for *Edwards* purposes on September 10, that the police lied to him about not having a lawyer, or that the police kept him from seeing his lawyer". *Montejo, supra*, App A at 33A. Moreover, with regard to Montejo's argument on remand that he had clearly asserted his right to counsel but was worn down by the badgering of the police, the Louisiana Supreme Court observed that Montejo had previously asserted quite the opposite to that Court. In Montejo's brief to the Louisiana Supreme Court on original hearing, "defense counsel conceded that '[b]y Mr. Montejo's own admission his request for counsel [on September 10] was not a clear assertion or invocation of his right'". *Montejo, supra*, App A at 52A.

C. Louisiana procedural law has long prohibited defendants from raising new grounds for suppressing evidence on appeal

Montejo's assertion that the Louisiana Supreme Court crafted a new and unique rule to apply to him is wholly without merit. Defendant argues that Louisiana jurisprudence does not prohibit a new argument in support of suppression on appeal if the

constitutional provision at issue is the same as originally raised. However, he cites no authority for that argument, and in fact, the cases cited by the Louisiana Supreme Court, referenced below, dispel that argument.

The Louisiana Supreme Court reviewed the applicable Louisiana procedural rules governing suppression motions and the review of rulings thereon by appellate courts. *Montejo, supra*, App A at 36A. Motions to suppress are governed by La. C.Cr.P. art 703. A defendant may testify at the hearing of a suppression motion without being subject to interrogation into other matters, and his testimony cannot be used by the state at trial, except to attack the credibility of his trial testimony.

"Louisiana courts have long held a defendant may not raise new grounds for suppressing evidence on appeal that he did not raise at the trial court in a motion to suppress." *Montejo, supra*, App A at 40A. In reiterating this long-standing principle, the Louisiana Supreme Court cited *State v. Brown*, 434 So.2d 399 (La. 1983), which rejected a defendant's alternative argument regarding the denial of his motion to suppress because he had not raised the issue at trial; *State v. Johnson*, 993 So.2d 326 (La. App. 4 Cir. 2008), which held that failure to raise a ground for suppressing evidence in a properly filed motion to suppress waives such a basis for exclusion on appeal; and *State v. Jackson*, 904 So.2d 907 (La. App. 5 Cir. 2005), *writ denied* 924 So.2d 162 (La. 2006), which held that a defendant is limited on appeal to the grounds he articulated at trial, and a new basis for a claim, even if it would be meritorious, cannot be raised for the first time on appeal. In *Jackson*, the Louisiana

court found that while the defendant had challenged the voluntariness of his confession, neither his written motion nor the evidence presented at the motion hearing alleged that the statement was involuntary because of his young age or because he was sleep deprived at the time of the statement. The defendant was not allowed to raise these new bases for suppression of his statement for the first time on appeal, and therefore, they were not properly before the appellate court. This ruling specifically contradicts Montejo's argument that a Louisiana court has never ruled that an alternative argument based on the same constitutional ground has been held to constitute "new grounds" prohibited on appeal. In that case, the constitutional reason, i.e. voluntariness, remained the same, but the factual argument differed, and the courts held the new argument was barred for failure to assert the same issue to the trial court.

La. C.Cr.P. art. 841 provides that a new basis for an objection cannot be raised for the first time on appeal. The underlying principle for this rule is to "give the State adequate notice so that it may present evidence and address the issue at trial on the motion. Because Montejo did not raise these grounds in a motion to suppress or allege facts supporting these grounds, the State had no need to put on evidence tending to show that defendant never made a clear assertion of his right to counsel or that the police never misled him". *Montejo, supra*. App A at 44A.

While the Louisiana Supreme Court noted the jurisprudential rule that appellate courts will review the totality of the evidence presented at the suppression hearing and trial when reviewing a suppression ruling, this rule is "not applied where the

grounds for suppression were not asserted in the motion to suppress". *Montejo, supra*, App A at 46A. The Louisiana Supreme Court has "never allowed a defendant to allege facts for the first time in trial testimony which would support a new argument for suppression of evidence, and have a reviewing court consider those facts in determining whether the district court should have granted a motion to suppress on grounds that were never argued to, or considered by, the district court". *Montejo, supra*, App A at 46A. "The entire criminal justice system will become chaotic if the Court allows defendants to withhold testimony which they allege is relevant to a suppression issue until the end of trial after the evidence has been admitted, then raise the issue on appeal, when the trial court has had no opportunity to rule with all evidence before it." *Montejo, supra*, App A at 46-47A.

While this Court overruled *Michigan v. Jackson*, the jurisprudence that Montejo now relies upon was in force at the time of the filing of and hearing on the motion to suppress herein. There was nothing prohibiting Montejo from raising these issues at that time, in order to allow the State to present evidence on this issue. As the Louisiana Supreme Court held, if he had such a claim, he was required to raise it in the motion to suppress. *Montejo, supra*, App A at 50A.

The Louisiana Supreme Court answered the query raised by this Court in its remand, i.e. whether Montejo's testimony may have come too late to affect the propriety of the admission of the evidence. Under Louisiana procedural law, it did come too late, when he never raised these issues either in the motion to suppress or at the hearing on that motion.

D. Montejo did not make a clear assertion of the right to counsel when the officers approached him about accompanying them on the search for the weapon, and therefore, Edwards does not require suppression

Although the State asserts Montejo is procedurally barred from asserting this issue, as detailed above, the State further asserts that the claim fails on the merits.

The testimony at the suppression hearing by the police officers on this issue was uncontradicted. Detective Jerry Hall testified that, on the date at issue, he asked defendant if he had been contacted by a lawyer, and defendant responded that he had not, and defendant never indicated to him that he had a lawyer, never mentioned that a lawyer had been appointed to represent him and denied having a lawyer. In fact, according to Detective Hall, when he asked Montejo if he had been contacted by a lawyer, Montejo told him he did not need a lawyer and just wanted to clear this up, which is consistent with Montejo's claims that he entered the Ferrari house unarmed, then found the victim's gun. Montejo had offered to help find the gun, presumably to help prove his version of events, which he believed would show that he had no intent to murder the victim, because he was unarmed when he arrived. While Montejo only cites the testimony of Detective Hall regarding his questioning of Montejo as to whether he had been contacted by a lawyer, arguing it did not contradict Montejo's testimony, it ignores other testimony by Detective Hall in which it is clear that Montejo never requested counsel. Detective Hall specifically testified that Montejo never told him, at any time during that

day, that he had been appointed counsel, and Montejo did not ask for a lawyer. Accordingly, the State submits that there was no evidence before the trial court to suggest that Montejo ever indicated, in any manner, his "desire to deal with the police only through counsel". If this Court considers defendant's self-serving, last minute, disingenuous trial testimony, made after the admission of the evidence at issue, then the issue becomes a factual issue, one based on the credibility of the witnesses, one which was never determined by the trial court, because it never had the opportunity to do so since it was never raised by defendant.

In *Edwards*, *supra*, this Court held that an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. A suspect must unambiguously request counsel. He must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. See *Moran v. Burbine*, 475 U.S. 412, 433, n. 4 (1986) ("The interrogation must cease until an attorney is present *only* if the individual states that he wants an attorney"). (Citations and internal quotation marks omitted).

"The *Edwards* rule -- questioning must cease if the suspect asks for a lawyer -- provides a bright line that

can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney. . . . If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. . . . But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue." *Davis v. United States*, 512 U.S. 452 (1994).

"The *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*. The rule of that case applies only when the suspect 'has *expressed*' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." *McNeil v. Wisconsin*, 501 U.S. 171 (1991). (Citations omitted.) While defendant likens his statement to that asserted by the defendant in *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), the State

submits that the cases are not close. In *Minnick*, the defendant told the police, "Come back Monday when I have a lawyer", and he further stated that he would make a more complete statement then with his lawyer present.

Although the State asserts that Montejo's testimony on this issue was not credible, his testimony did not establish that he made a "clear request" for counsel. Even under Montejos' version, he only stated that he thought he had a lawyer appointed to represent him, not that he was expressing a desire to deal with the police through counsel, as required by *Edwards*. In addition, the Louisiana Supreme Court found that Montejo, in his original brief on appeal in that court, had conceded that his request for counsel on September 10 was not a clear assertion or invocation of his right. *Montejo, supra*, App A at 52A. Montejo's statements did not constitute a clear assertion of his right to counsel for purposes of *Edwards*, and the State submits this argument fails.

E. The police did not make any intentional misrepresentations to Montejo regarding his counsel and repeatedly informed him of his right to counsel

Montejo's arguments regarding alleged intentional misconduct by the police are completely based upon the truth and veracity of his testimony. The police unequivocally testified that Montejo told them he did not have a lawyer, and he was repeatedly advised of his right to counsel, which he repeatedly waived. There is no evidence to suggest that Det. Hall knew that counsel had been appointed earlier that day to represent Montejo, and in fact, Det. Hall testified he

did not know of the appointment of counsel. In addition, Montejo's characterization of Montejo's counsel walking through the front door while the police took Montejo out the back door is without merit and unsupported by the record. It was not until the officers *returned* to the jail with Montejo that they were notified that Montejo's counsel was trying to reach him, and when contacted, the police promptly met Montejo's counsel. The officers did not prevent Montejo's counsel from meeting with him. Typically, the trial court would have determined any credibility issues, but Montejo never allowed it to do so on this issue, because he never raised this issue before the trial court.

This alleged conduct is certainly not the "egregious" police misconduct referenced by the Court in *Moran v. Burbine*, 475 U.S. 412 (1986), nor does such conduct constitute "intentional" or "affirmative" misrepresentations, as described by Montejo in his Petition. As this Court recognized in its opinion herein, "[p]olice who did not attend the hearing would have no way to know whether they could approach a particular defendant; and for a court to adjudicate that question *ex post* would be a fact-intensive and burdensome task". *Montejo, supra* at 129 S.Ct. 2084.

F. The September 6th confession by Montejo was not at issue when this case was originally before this Court and was not at issue in the remand, and accordingly, it is not properly before this Court

The only issue before this Court originally was the admission of the apology letter written by Montejo on September 10th. The issues surrounding his

videotaped confession on September 6th were not previously before this Court and were not part of the remand by this Court. This Court specifically stated in its opinion that Montejo "should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*". *Montejo v. Louisiana*, 556 U.S. ---, 129 S.Ct. 2079, 2091 (2009). In accordance with the remand, it was the admission of the letter of apology that was before the Louisiana Supreme Court, not the videotaped confession.

Now, Montejo seeks to argue the merits of the admission of the September 6th statements, and the State submits that issue is not properly before this Court. The Louisiana Supreme Court previously ruled on this issue in its original opinion, and no further review of that issue was sought before this Court.

G. Harmless Error

Although the State submits that the trial court properly denied defendant's motion to suppress, the erroneous admission of a confession is a trial error which is subject to a harmless error analysis. The State submits the jury had sufficient other evidence before it to render the verdict surely unattributable to this alleged error. The jury heard the videotaped confession of Montejo, which admissibility was upheld by the Louisiana Supreme Court and, as stated above, was not an issue before this Court. In addition, the corroborating evidence was substantial.

The State submits any error in admitting the letter at issue was harmless in light of the other evidence presented to the jury at trial, including the "properly

admitted videotaped confession, Montejo's own incredible trial testimony, the eyewitnesses who saw Montejo's car flee the vicinity of the crime, evidence of the proceeds of the crime found on Montejo and Gai, the testimony concerning motive, and the presence of Montejo's DNA under the victim's fingernails which an expert testified was the result of the victim intentionally scratching the defendant". *Montejo, supra*, App A at 71-72A.

The Louisiana Supreme Court agreed that any such error was harmless, noting that while the letter was introduced in the State's case in chief, references to the letter by the State were minimal and more akin to impeachment, whereas the defense referred to the letter at length in an attempt to diminish the credibility of the police. The Louisiana Supreme Court found the letter was inconsequential in comparison to the other evidence, and any error in its admission was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the State of Louisiana submits that the Petition for Writ of Certiorari filed by Jesse Montejo should be denied.

Respectfully submitted:

KATHRYN LANDRY
Counsel of Record
WALTER P. REED, District Attorney
HOUSTON C. GASCON, III
SCOTT C. GARDNER
Post Office Box 82659
Baton Rouge, LA 70884
Telephone: (225) 766-0023
Kathilandry@aol.com

Counsel for Respondent,
State of Louisiana

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IN THE
Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN REPLY TO OPPOSITION

G. BEN COHEN*
BIDISH SARMA

THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

ROBERT J. SMITH

CHARLES HAMILTON HOUSTON
INSTITUTE FOR RACE & JUSTICE
125 Mount Auburn Street
Cambridge, MA 02138

**Counsel of Record for Petitioner*

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BRIEF IN REPLY

Petitioner Jesse Jay Montejo hereby submits this reply in support of his petition for a writ of certiorari, filed on September 22, 2010.

This Court discarded the prophylactic rule of *Michigan v. Jackson*[1] because it determined that the *Miranda-Edwards*[2]*-Minnick*[3] line of cases "suffice[d]" to protect "a suspect's voluntary choice not to speak outside his lawyer's presence." *Montejo v. Louisiana*, 129 S.Ct. 2079, 2090 (2009) (*quoting Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)). This case tests the validity of that proposition. Neither the Louisiana Supreme Court[4] on remand, nor the *State's Opposition Brief*, suggests that this was an instance of unencumbered free will; rather it is an example of how deceitful police conduct can undermine the ability of a suspect to make a voluntary choice to communicate only through counsel.

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[1] *Michigan v. Jackson*, 475 U.S. 625 (1986).

[2] *Edwards v. Arizona*, 451 U.S. 477 (1981).

[3] *Minnick v. Mississippi*, 498 U.S. 146 (1990).

[4] *State v. Montejo*, 40 So. 3d 952 (La. 2010).

I. The Opposition Brief Does Not Contest That the Louisiana Supreme Court Agreed that State Law Permits Appellate Use of Trial Testimony to Challenge the Admissibility of a Statement

This Court observed that "Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections." *Id.* at 2091. Nevertheless, the *State's Brief in Opposition* argues that Montejo's failure to pursue the *Edwards*' objection forever forecloses review. This Court recognized that there was a good reason Montejo had not pursued the *Edwards* claim: the State had never asked the trial court, the Louisiana Supreme Court, or the Supreme Court of the United States to eliminate the rule of *Michigan v. Jackson*. [5]

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[5] The *State's Brief in Opposition* spends considerable effort asserting that defense counsel on Mr. Montejo's original appeal either did not raise or else waived the *Edwards* issue. But, had the State raised either in the trial court, the Louisiana Supreme Court or in this Court the assertion that *Michigan v. Jackson* should be overruled, Mr. Montejo would have been on notice to argue as a separate and additional ground the *Edwards* violation. Instead, the State never raised the claim, and only argued that *Jackson* should be overruled after this Court asked the parties to brief the question.

The sole procedural question this Court remanded to the Louisiana Supreme Court was whether Montejo's testimony at the trial came too late to prevail on the issue – not whether he could raise the issue at all. There is a marked difference between determining whether testimony admitted at trial is relevant to suppression (true under state law), and imposing a new procedural rule that requires defendants to anticipate – without any claim by the State challenging the law – adverse changes in the law and file pleadings prior to trial in contemplation of these unrealized jurisprudential changes.

The Louisiana Supreme Court grudgingly conceded that Montejo's testimony did not come too late to affect the admissibility of the apology letter – "a reviewing court may consider trial testimony in determining whether a motion to suppress should have been granted" – but did so only in the context of creating a unique procedural bar.[6] Pet. App. 10a.

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[6] While Petitioner asserts that this new procedural rule is unfounded, the *State's Brief in Opposition* defends the application of this procedural rule by citing to an intermediate appellate court decision (one decided after Montejo's conviction and death sentence no less). See *State's Brief* citing *State v. Jackson*, 904 So. 2d 907 (La. App. 5 Cir. 2005) . The argument is inapposite; this Court did not remand the matter to determine whether Louisiana law precludes the litigation of a

Under state law, new evidence on legal claims is admissible at the trial of the merits. In *State v. Joseph*, 434 So. 2d 1057 (La. 1983), the parties agreed to stipulate to the evidence that would be presented at trial (limiting it to evidence presented at the suppression hearing). But, the defendant at trial "testified that the confession was beaten out of him." *Id.* at 1061 n.3. The Louisiana Supreme Court explained that the State then had "choice to present rebuttal evidence to 'rehabilitate' the confession, or not." *Id.* The Court noted that had the defendant been convicted, he would have been entitled to a remand of the case for a rehearing on the suppression issue. *Id.*

The same treatment is warranted here. In this case, this Court remanded to the Louisiana Supreme Court to permit a full fact-finding concerning the circumstances of the State's interrogation of Mr.

---

new claim on appeal, but instead whether—assuming a timely objection had been made—Montejo's trial testimony could be considered under Louisiana law. The Louisiana Supreme Court's remand opinion clearly states that Montejo's testimony could be considered. Pet. App. 45a *citing State v. Burkhalter*, 428 So. 2d 449, 455 (La. 1983) and *State v. West*, 408 So. 2d 1302, 1308 (La. 1982) ("Although the state put on no evidence at the hearing on the motion to suppress, we look to the totality of the evidence produced both at that hearing and at trial when we assess whether the state has carried its burden").

Montejo. Petitioner urged the Louisiana Supreme Court to remand the matter to the district court for that fact-finding (which would have also provided the State an opportunity to rebut Mr. Montejo's claims). The Louisiana Supreme Court did not take the opportunity to allow supplementation of the record. Montejo still awaits substantive review of his claims – including the resolution of factual discrepancies – and urges this Court either to remand again or reverse outright.

II. The State's Brief Does Not Contest that Both the Trial Court and the Louisiana Supreme Court Erroneously Conflated the Fifth and Sixth Amendments Under *Moran v. Burbine*[7]

In the *Petition for Certiorari*, Mr. Montejo noted – as members of this Court had observed in oral argument – that deception acceptable under the Fifth Amendment was not appropriate under Sixth Amendment. *See Petition for Certiorari* at 20-30 (discussing *Moran v. Burbine*). The *State's Brief in Opposition* does not contest that the trial court's legal decision and the Louisiana Supreme Court's ruling were predicated upon a legal interpretation of *Burbine* that specifically conflated the Fifth and Sixth Amendments. R. 1067-68 ("The [district] court

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[7] *Moran v. Burbine*, 475 U.S. 412 (1986).

looks to the jurisprudence not only of Louisiana but as handed down by the United States Supreme Court and this Court relies upon the decision of *Moran versus Burbine* which . . . states that the [] case narrowly construed the defendant's *Miranda* rights by holding that only the accused himself can invoke the right to an attorney not withstanding deceptive tactics by the arresting officers."); *State v. Montejo*, 974 So. 2d 1238, 1262 n.69 (La. 2008) ("Even if defendant's statement is true and the police did tell defendant he did not have a lawyer, this does not rise to the level of the facts presented in *Moran v. Burbine*, supra. In that case, the United States Supreme Court permitted a *Miranda* waiver to stand under the Sixth Amendment where a suspect was not told that his lawyer was trying to reach him during questioning and the lawyer was told by police that the defendant would not be questioned without the lawyer's presence."). These claims are preserved and should now be decided on the basis of the record before the Court.[8]

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[8] *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988).

III. Neither The Louisiana Supreme Court Nor The State Contends That The Introduction Of The Letter Was Harmless Beyond A Reasonable Doubt In The Penalty Phase

The *State's Brief in Opposition* does not even allege that the introduction of the September 10th apology letter was harmless (much less beyond a reasonable doubt) at the penalty phase. The Louisiana Supreme Court similarly did not find the introduction of the apology letter to be harmless with respect to penalty.

Moreover, both the *Brief in Opposition* and the *remand opinion* fail to rebut Montejo's point that the letter was harmful at the guilt phase primarily because it provided the only evidence corroborating the unreliable statement that Montejo gave to the police on September 6th after enduring more than seven hours of deceitful and coercive interrogation (during which he asked to answer no more questions without counsel). Montejo's trial testimony, which corroborated the version of events he relayed multiple times to the police on the 6th, indicates that he was not Ferrari's shooter. The letter's introduction was central to the determination whether the crime constituted first or second-degree murder.

Because the State court was silent on the question of whether the introduction of this evidence

was harmless with respect to penalty, as well as with respect to the difference between first and second degree murder,[9] this Court can make that determination in the first instance.

IV. Montejo Raised the Relevance of the September 6th *Edwards* Violation on Remand

Montejo raised the *Edwards* issue with respect to the September 6th statement both in his original brief to the Louisiana Supreme Court and on remand from this Court.[10] The detective's treatment of Montejo on September 6th is both an independent constitutional violation, and, in light of the remand, strong corroborating evidence that Montejo did not make a free, knowing and intelligent waiver of his right to counsel. The detectives admitted to lying to Montejo on the 6th to try to obtain a confession. *See Montejo*, 974 So. 2d at 1245 n.26; *id.* at 1246 n.28; *id.*

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[9] The Louisiana Supreme Court reviewed the evidence that placed Montejo at the scene of the crime and concluded that his guilt was not effected by the admission of the apology letter, but that court did not determine whether the apology letter harmed Montejo's efforts to prove that he did not commit first-degree murder and that he should not be sentenced to death for his role in the crime.

[10] Notably, the *Brief in Opposition* does not assert that the conduct in this case did not constitute an *Edwards* violation.

at 1246 n.29; *id.* at 1246 n.30. The Louisiana Supreme Court noted the "hectoring" tone the detectives used when communicating with Montejo immediately following his clear assertion of the right to counsel, and even noted that the detective's conduct on the 6th merited "close scrutiny." *Id.* at 1265. The disregard for Montejo's rights displayed on September 6th exacerbates the falsehoods that the detectives relayed to Montejo on the 10th, and contextualizes Montejo's confusion when the detectives told him that he did not have counsel. This Court should review the police (mis)conduct on September 6th, because the totality of the circumstances make clear that the statements secured from Montejo resulted from police pressure and trickery, rather than Montejo's free-will.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and vacate the Louisiana Supreme Court's decision. This Court should either remand the case to the Louisiana Supreme Court or else reverse outright.

Respectfully submitted,

G. Ben Cohen*
Bidish Sarma

The Capital
Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

Robert Smith

Houston Institute for
Race & Justice
125 Mount Auburn St.
Cambridge, MA 02138

*Counsel of Record for Petitioner